RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
SUFYIAN BARHOUMI

ALSO KNOWN AS:

ABU OBAIDA
UBAYDAH AL JAZA'IRI
SHAFIQ

NO. 050006

VOLUME VII OF ___ TOTAL VOLUMES

2006 SELECTED
U.S. DISTRICT COURT FILINGS
(NO REDACTIONS)

United States v. Sufyian Barhoumi, NO. 050006

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After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

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RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO COMPEL PRIVILEGE TEAM COMPLIANCE WITH THE AMENDED PROTECTIVE ORDER

Respondents, through undersigned counsel, hereby oppose petitioners' motion to compel Privilege Team compliance with the Amended Protective Order.

On March 2, 2006, Magistrate Judge Kay authorized a Special Litigation Team to represent the Department of Defense Privilege Team with respect to petitioners' motion and ordered the Special Litigation Team to respond on behalf of the Privilege Team by March 13, 2006. The instant opposition is submitted on behalf of respondents in the interest of proper administration of the protective prder and counsel access regime governing the Guantanamo detainee habeas cases.

Petitioners' motion seeks an order compelling the Privilege Team (1) to conduct a security "classification review of every document submitted by habeas counsel, without exception" and (2) to cease marking any documents or information as "protected information." *See* Petitioners' Motion to Compel at 18. Notably, petitioners' do not seek relief with respect to any specific documents submitted to the Privilege Team for classification review. Instead, petitioners' seek a extraordinarily broad order based on stale grievances with the Privilege Team, many of which, to respondents' counsel's knowledge, have already been resolved. As explained below, no basis exists for such an order. The Court not only lacks jurisdiction by virtue of the Detainee Treatment Act of 2005, which withdraws court jurisdiction over habeas and other claims by Guantanamo detainees, but the actions of the Privilege Team challenged by petitioners are fully justified and consistent with the governing protective order and counsel access regime. First, the Privilege Team is under no legal obligation to perform a classification review of every piece of information presented to it by habeas counsel. The privileged "legal mail" channels created by the governing counsel access procedures are reserved for materials "for purposes of

litigating" the habeas corpus cases. Thus, the Privilege Team has the authority under the access procedures to refuse to conduct a classification review of non-legal information or information that is not for the purpose of the habeas litigation. Second, the Privilege Team may mark information submitted to it as "protected information." For these reasons, petitioners' motion to compel should be denied.

BACKGROUND

On November 8, 2004, Senior Judge Joyce Hens Green, in the context of the then-pending and coordinated Guantanamo Bay detainee habeas cases, entered an Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba ("Protective Order"), followed shortly thereafter by certain supplementary orders clarifying and detailing certain matters involved the Protective Order. *See In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. Nov. 8, 2004); Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order in *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.* (D.D.C. Dec. 13, 2004); Order Addressing Designation Procedures for "Protected Information" in *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.* (D.D.C. Nov. 10, 2004). The Protective Order was entered by Judge Green after the parties had engaged in lengthy negotiations, after certain issues had been litigated, and after Judge Green considered a proposed protective order and counsel access procedures and made her own revisions to them.[1]

The Protective Order, *inter alia*, establishes a regime for the protection, handling, and

[1] With respect to the cases at issue in petitioners' motion, the Protective Order has been entered by the respective Judges of this Court in every case except *Nabil* (05-CV-1504 (RMC)), *Al Hawary* (05-CV-1505 (RMC)), and *Shafiq* (05-CV-1506 (RMC)).

control of classified and otherwise protected information in light of the unique circumstances of these Guantanamo *habeas* cases, which involve individuals detained as enemy combatants in an overseas military detention facility during wartime. The Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba, ("Access Procedures"), which are annexed to the Protective Order as Exhibit A, in turn, set certain terms, conditions, and limitations for habeas counsel's access to properly represented detainees, including procedures and requirements with respect to information and papers delivered by counsel to detainees, as well as obtained by counsel from detainees, "for purposes of litigating the cases in which this Order is issued." *See* Access Procedures § I.

The Access Procedures permit privileged counsel visits and privileged "legal mail" between counsel and a represented petitioner, subject to various requirements and restrictions in recognition of the unique wartime setting of these cases and detentions. Because all communications to and from the wartime detainees at Guantanamo such as petitioners are normally and appropriately subject to security and intelligence screening by the military, the special, privileged legal communications channels created under the Access Procedures are available only for "legal mail" sent solely "for purposes of litigating the cases in which th[e] Order is issued." Access Procedures §§ I, II.E. Privileged "legal mail" is, by definition, limited to:

> Letters written between counsel and a detainee that are related to the counsel's representation of the detainee, as well as privileged documents and publicly filed legal documents relating to that representation.

Id. § II.E. Detainees, however, are not permitted to use this privileged mail system for non-legal mail, including communications with others besides their counsel; the Access Procedures

contemplate and require that non-legal communications be routed through the normal mail process at Guantanamo Bay, which includes content screening for national security, intelligence, and physical and personnel security[2] purposes. *See id.* § IV.B.4.-5. (counsel may not use legal mail channels as conduit for non-legal mail; non-legal mail subject to review by military); *see also id.* § VI.C. (messages to others besides counsel to be processed as non-legal mail); § IV.A.5. (non-legal mail communications to detainees to be sent to detainee through normal, non-privileged mail channels).

Also in recognition of the unique, wartime setting of these cases and detentions, including that information possessed by detainees could have national security or physical and personnel security implications warranting potential treatment of the information as classified information, the Access Procedures require that communications from detainees and information learned from them be treated as presumptively classified. *See* Access Procedures §§ III.A., IV.A.6., VI. Such information, including letters and materials reflecting communications to counsel from a represented detainee, may only be handled in a secure fashion and within the secure facility established for such purposes. *See* Protective Order ¶ 26; *id.* ¶¶ 20-24. Counsel, however, may submit such materials to the DoD Privilege Team for a "determination of its appropriate security classification." *See* Access Procedures § VII.; *see also id.* § IV.A.6. (counsel required to treat information learned from a detainee, "including any oral and written communications with a detainee," as classified pending review by Privilege Team).

As set forth in the Access Procedures, the Privilege Team is "[a] team comprised of one

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[2] This would include information concerning the Guantanamo Bay facility and its personnel.

or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee."[3] *Id.* § II.D. Absent Court authorization or the consent of counsel submitting the information to the Privilege Team, the Privilege Team cannot disclose to anyone information learned from their review activities, except that the Privilege Team may disclose information indicating an "immediate and substantial harm to national security" or "imminent acts of violence" to officials with a role in responding to such potential harms or violence. *See id.* § VII. A., D.-F. Materials properly marked by the Privilege Team as classified may only be handled in a secure fashion and within the secure facility; of course, materials determined to be unclassified are not subject to such treatment. *See* Protective Order ¶ 26; *id.* ¶¶ 20-24. Information can also be designated as "protected information," which is information that must be treated as confidential and under seal, though not classified, in order to protect government security interests or other significant government interests. *See* Protective Order ¶¶ 1, 11, 35-45; Order Addressing Designation Procedures for "Protected Information" in *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.* (D.D.C. Nov. 10, 2004).

On February 21, 2006, petitioners in twelve of the above-captioned cases filed a motion to motion to compel Privilege Team compliance with the Protective Order. Petitioners in three additional cases – *Abdah, Al-Hela, Hatim* – joined the motion by filing a single-page case caption on February 22, 2006. Thereafter, on March 2, 2006, United States Magistrate Judge

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[3] The Team may also include translators meeting the same qualification. *See* Access Procedures § II.D.

Alan Kay issued an order appointing a Special Litigation Team to represent the Privilege Team in its response to petitioners' motion to compel, pursuant to the terms of Judge Kay's February 2, 2006 Order, authorizing a Special Litigation Team in *Salahi v Bush*, 05-CV-569 (JR) (dkt. no. 49). Judge Kay further ordered that the Special Litigation Team respond to petitioners' motion to compel by March, 13, 2006. Although a Special Litigation Team has been appointed to represent the interests of the Privilege Team, respondents submit this opposition based on their own interest in the proper administration of the Protective Order and Access Procedures. Because petitioners' motion does not seek relief with respect to particularized privileged documents submitted to the Privilege Team for classification review, respondents' opposition is limited solely to a discussion of the general legal issues raised in petitioners' motion regarding the scope of the Privilege Team's authority under the Protective Order and Access Procedures. As explained below, petitioners' motion to compel should be denied based on the Detainee Treatment Act of 2005 and petitioners' erroneous understanding of the Privilege Team's authority under the Protective Order and Access Procedures.

ARGUMENT

I. The Court Lacks Jurisdiction To Order Relief.

On December 30, 2005, the Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, 119 Stat. 2680 ("the Act"), became law. The Act, among other things, amends the federal habeas corpus statute to remove court jurisdiction to hear or consider applications for writs of habeas corpus and other actions brought in this Court by or on behalf of aliens detained at Guantanamo. Section 1005(e)(1) of the Act amends 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction" to consider either (1) habeas petitions filed by aliens

detained by the Department of Defense at Guantanamo, or (2) any other action relating to any aspect of the detention of such aliens. In addition, the Act creates an exclusive review mechanism in the D.C. Circuit to address the validity of the detention of such aliens held as enemy combatants; § 1005(e)(2) of the Act states that the United States Court of Appeals for the District of Columbia Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," and it further specifies the scope and intensiveness of that review. Section 1005(e)(1), which eliminates the jurisdiction of the courts to consider habeas and other actions brought by Guantanamo detainees, was made immediately effective without any reservation for pending cases, while § 1005(e)(2), which establishes the exclusive review mechanism in the D.C. Circuit, was made expressly applicable to pending claims. *Id.* § 1005(h). In light of the new, statutory withdrawal of this Court's jurisdiction and the creation of an exclusive review mechanism in the D.C. Circuit, petitioners' request for relief should be denied. Indeed, because the Act vests "exclusive" jurisdiction in the D.C. Circuit "to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," *id.* § 1005(e)(1), it would be inappropriate for the Court to order relief in the interim that might infringe upon the Court of Appeals' exclusive jurisdiction. *See Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 75, 78-79 (D.C. Cir. 1984) (request for relief in district court that might affect Court of Appeals' future, exclusive jurisdiction is subject to the exclusive review of the Court of Appeals).

It has been our understanding that it was the sense of the Court to await anticipated

guidance from the D.C. Circuit regarding the effect of the Act[4] before deciding any pending motions, with Magistrate Judge Kay being available to assist the parties in the negotiation and resolution of important matters raised during this interim period, where appropriate. In such circumstances, a stay of all proceedings in the cases, including with respect to petitioners' request for relief, would be appropriate pending the resolution of the effect of the Act. But the Court cannot and should not proceed to consider granting petitioners' request for relief, which seeks to have the Court limit the Privilege Team's authority to review information under the Protective Order and Access Procedures, without first determining whether the Court has jurisdiction under the Detainee Treatment Act. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception.") (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

The nature of the relief requested in petitioners' motion does not warrant departure from such an approach, particularly given the stale nature of petitioners' complaints regarding prior Privilege Team actions and, moreover, the fact that petitioners seek relief merely to satisfy conceptual grievances regarding the scope of the Privilege Team's authority. For these reasons, petitioners will not suffer any immediate or irreparable harm should the Court decide to await a decision from D.C. Circuit regarding the effect of the Act before considering the present motion.

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[4] The effect of the Act is being addressed in supplemental briefing in the Guantanamo detainee appeals pending before the D.C. Circuit. On January 27, 2006, the D.C. Circuit issued a revised supplemental briefing schedule, requiring an initial brief by respondents on February 17, 2006, with an opposition by petitioners due on March 10, 2006, and respondents' reply due on March 17, 2006. Oral argument is scheduled for March 22, 2006.

Indeed, respondents are unclear how certain petitioners who have joined the motion to compel have suffered any cognizable harm or have any basis to assert any complaints against Privilege Team action in light of the fact that the Protective Order has not been entered in their cases.[5] *See supra* note 1.

In any event, pursuant to the plain language of the Act this Court has no jurisdiction with respect to any of the cases at issue in the motion to compel. The legal authorities demonstrating that statutes such as § 1005(e)(1) of the Act that remove or extend jurisdiction apply to pending cases and ordinarily should be given immediate effect, are addressed in the supplemental brief on the issue that respondents have filed in the pending appeals in the Court of Appeals, which is attached as Exhibit 1 and is incorporated by reference. For the reasons explained therein, *see* Ex. 1 at pp. 20-53, the Court lacks jurisdiction over these cases and should not grant the relief sought by petitioners' motion to compel.

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[5] Furthermore, six of the fifteen cases at issue in the motion to compel, including three in which the protective order has not been entered, are assigned to either Judge Collyer – *Saib* (05-CV-1353 (RMC), *Nabil* (05-CV-1504, (RMC)), *Al Hawary* (05-CV-1505 (RMC)), *Shafiq* (05-CV-1506 (RMC)), *Mohammed*, (05-CV-2087 (RMC)) – or Judge Bates – *Al Anazi* (05-CV-345 (JDB)). In light of the Detainee Treatment Act, Judge Bates has held all pending motions in his Guantanamo habeas cases in abeyance pending the outcome of the appeal in the D.C. Circuit. *See, e.g., Hamad v. Bush*, 05-CV-1009 (JDB), Order (March 2, 2006) (dkt. no. 25). Similarly, Judge Collyer has entered an Order in all of her pending Guantanamo habeas cases "denying without prejudice all pending motions until such time as the District of Columbia Circuit resolves the question of this Court's jurisdiction to adjudicate these cases; and staying the action pending the jurisdictional ruling of the District of Columbia Circuit." *See, e.g., Mohammed v. Bush*, 05-CV-2087 (RMC), Order (Jan. 27, 2006) (dkt. no. 23). Thus, at the very least, the Court should take no action on petitioners' motion in these cases.

II. The Privilege Team Has Authority Under the Protective Order and Access Procedures To Decline Classification Review Of Non-Legal Materials And Other Information Intended For Purposes Other Than The Habeas Litigation.

Even aside from the question of jurisdiction, petitioners' request for order compelling the Privilege Team to perform a security "classification review of every document submitted by habeas counsel, without exception" lacks merit. *See* Petitioners' Motion to Compel at 18. Petitioners' seek an extraordinarily broad order that would require the Privilege Team to perform a classification review of any and every document or piece of information submitted by habeas counsel, regardless of its content, its relevance to the pending habeas litigation, or the source or manner by which it was obtained. Such an overreaching order is not warranted by the Protective Order or the Access Procedures.

As explained above, consistent with the unique circumstances of these cases, which involve aliens detained during wartime in an overseas military detention facility, the Protective Order and Access Procedures impose two substantial limitations on the privileged communications system that has been established for habeas counsel and petitioners. First, the Access Procedures state at the outset that they govern counsel access solely "for purposes of litigating the cases in which the Order is issued."[6] *See* Access Procedures § I. Second, privileged communications are limited to "legal mail," as defined by section II.E of the Access Procedures. In light of these limitations, the Privilege Team unquestionably has the authority to refuse to perform a classification review of non-legal information as well as information that is not for purposes of the pending habeas litigation.

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[6] Remarkably, petitioners ignore this provision altogether and argue that "the purpose of which the document will ultimately be used is of [no] relevance for the Privilege Team's duties under the Protective Order." See Petitioners' Motion to Compel at 11.

This conclusion is supported by the fact that detainees are not permitted to use the privileged mail system for non-legal mail, including communications with others besides their counsel. The Access Procedures contemplate and require that non-legal communications be routed through the normal mail process at Guantanamo Bay, which includes content screening for national security, intelligence, and physical and personnel security purposes. *See id.* § IV.B.4.-5. (counsel may not use legal mail channels as conduit for non-legal mail; non-legal mail subject to review by military); *see also id.* § VI.C. (messages to others besides counsel to be processed as non-legal mail); § IV.A.5. (non-legal mail communications to detainees to be sent to detainee through normal, non-privileged mail channels). Indeed, the Access Procedures state that any non-legal information received by counsel through the privileged communications channels must be returned to military personnel at Guantanamo for processing in accordance with standard operating procedures for detainee non-legal mail. *See id.* §§ IV.B.5, VI.C. Thus, it would be an abuse by counsel and petitioners of the privileged legal mail channels created "for purposes of litigating the [habeas] cases" to permit petitioners to use those channels to conduct potential business or seek legal advice related to other matters.[7] For example, it is beyond

[7] To require otherwise, and order the Privilege Team to conduct a classification review of every document submitted by habeas counsel, could ultimately blur the well-established distinction in the Access Procedures between legal and non-legal mail. Indeed, detainees would have little incentive to send non-legal mail through non-legal channels given the knowledge that any document, whether non-legal or legal, presented to the Privilege Team would have to be reviewed and, if unclassified, could be distributed by counsel. Respondents, of course, presume that habeas counsel act in good faith and would return any non-legal documents to Guantanamo, as they are required to do under the Access Procedures. *See* Access Procedures §§ IV.B.5, VI.C. However, the broader point is that if petitioners' proposed order is accepted, habeas counsel would be the sole and final arbiter of whether a document is appropriate for consideration by the Privilege Team and, regardless of any objection to the contrary, the Privilege Team would be compelled to perform a classification review of that document.

dispute that patently obvious non-legal mail such as letter from a detainee to his family or a work of fiction written by a detainee during his detention is not appropriate for review by the Privilege Team.[8] However, under habeas counsel's proposed framework, the Privilege Team would be powerless to refuse to review to such material. The Privilege Team, accordingly, serves as an appropriate check on such improper submissions, however innocent, by refusing to review information that is of a non-legal nature or that is intended for purposes other than the habeas litigation.

Although petitioners do not ask for relief with respect to specific documents submitted for review by the Privilege Team, they provide several examples of documents that the Privilege Team refused to review in order to illustrate alleged misconduct by the Privilege Team. *See* Petitioners' Motion to Compel at 12-13. Aside from the fact that some of the issues have long since been resolved, the cited examples do not establish any impropriety by the Privilege Team.[9] First, counsel complain that the Privilege Team refused to review certain letters submitted prior to November 2005 that "tell the world" about the alleged torture the detainee has suffered, *id.* at 12, but the accompanying memorandum from the Privilege Team establishes that the detainee wrote the letter to counsel with the instruction that counsel pass along the information to the detainee's family, among others. *See* Declaration of Marc Falkoff, Exhibit C. Thus, the detainee was improperly attempting to use counsel as a conduit for non-legal communications to persons

[8] Indeed, if such material comes into counsel's possession, they are required to return it to Guantanamo for processing in accordance with standard procedures for non-legal mail. *See* Access Procedures §§ IV.B.5, VI.C.

[9] Respondents arguments in this regard are drawn solely from the information provided in petitioners' motion to compel and exhibits submitted in support thereof.

other than counsel. In this situation, the Privilege Team correctly refused to review the information.

Second, petitioners contend that in September 2005 the Privilege Team initially refused to review official medical charts from Guantanamo pertaining to the weight loss of a particular detainee on the basis that the documents may have been improperly procured by petitioners' counsel. *See* Declaration of Kristine Huskey ¶¶ 4-6. However, there is nothing in the Protective Order or Access Procedures that would prohibit the Privilege Team from taking steps to ensure that documents submitted by habeas counsel were not improperly confiscated or stolen from Guantanamo, particularly given the stay of proceedings in these cases and the absence of ongoing discovery. In any event, as the declaration makes clear, the Privilege Team ultimately agreed to review the medical records at a later date and determined that they were unclassified. *See id.* ¶ 6. Furthermore, the records in question also were submitted by petitioners' counsel to the Court and respondents' counsel in a Court filing, and it was determined that the records in were unclassified[10] and properly released to the detainee at issue, a point counsel fails to mention in the declaration. *See Al Odah v. Bush*, 02-CV-828 (CKK) (dkt no. 263) (filing of detainee medical records in support of motion for preliminary injunction).

Finally, counsel contend that the Privilege Team improperly refused to review a "Last

[10] With respect to pleadings and documents filed with the Court, the Protective Order contains a detailed procedure that permits the government to conduct an appropriate classification review outside of the Privilege Team context. *See* Protective Order ¶¶ 46-48; Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order in *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.* (D.D.C. Dec. 13, 2004).

Will and Testament" written by a detainee in October 2005.[11] *See* Declaration of Kristine Huskey ¶¶ 8-10. Counsel, however, fail to offer any explanation why such a document is "for the purposes of litigating" the detainee's habeas corpus case, as required by the Access Procedures. While a will is unquestionably a legal document, the Access Procedures were not created to provide detainees with means to conduct, in a privileged fashion, probate matters or other legal affairs they may have an interest in addressing during the course of their detention. Consequently, the Privilege Team correctly refused to review the document.

For the reasons stated above, the Privilege Team has the authority under the Protective Order and Access Procedures to refuse to review non-legal documents and other documents intended for purposes other than the habeas litigation. Accordingly, petitioners' motion to compel should be denied.

III. The Privilege Team Has Authority Under the Protective Order and Access Procedures To Mark Information Submitted For Review as "Protected Information."

In addition to seeking an order compelling the Privilege Team to conduct a classification review of every document submitted by habeas counsel, petitioners also improperly request an order limiting the Privilege Team's authority to mark information submitted for review as "For Official Use Only," "FOUO," or "protected information." Contrary to petitioners' assertions, nothing in the Protective Order prohibits the Privilege Team from marking certain information in this fashion.

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[11] The stale nature of these complaints is illustrated by the dates of these various submissions by petitioners' counsel to the Privilege Team, some of which occurred nearly six months ago. In light of this fact, there is no imminent need for the Court to resolve this motion pending guidance from the D.C. Circuit regarding the effect of the Detainee Treatment Act of 2005.

As discussed above, the Protective Order contemplates three distinct categories of information in the Guantanamo habeas litigation: unclassified, classified, and protected information. *See* Protective Order ¶¶ 9-11, 17-45. "Protected information" is information that must be treated as confidential and under seal, though not classified, in order to protect government security interests or other significant government interests.[12] *See* Protective Order ¶¶ 1, 11, 35-45; Order Addressing Designation Procedures for "Protected Information" in *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.* (D.D.C. Nov. 10, 2004). Pursuant to the Access Procedures, the Privilege Team is specifically charged with performing an "appropriate security classification" of information submitted by habeas counsel. *See* Access Procedures § VII.A. More specifically, the Privilege Team is a security review clearinghouse established under the Protective Order primarily to conduct security reviews and to facilitate counsel-detainee access while addressing government security and other interests in the unique and unprecedented context of the Guantanamo habeas litigation. Indeed, the Access Procedures repeatedly reference the Privilege Team's authority to conduct an "appropriate security classification," a "classification determination," and a "classification review." *Id.* § VII. This type of review allows the Privilege Team to mark both classified and unclassified information with sufficient particularity to provide petitioners' counsel with appropriate guidance regarding the information in their possession. Accordingly, the Privilege Team has the authority consistent with the Protective Order and Access Procedures to mark information submitted by habeas counsel as either unclassified, classified, or protected while performing its security classification

[12] Examples of "protected information" designated by respondents include information that is law enforcement sensitive as well as information that implicates security and privacy protections, such as the names of certain personnel who work at Guantanamo Bay.

review of such material.

When the Privilege Team marks information as "protected information" during the classification review process, it is not, of course, an official Court-sanctioned designation that the information is properly deserving of protected status. *See* November 10, 2004 Order Addressing Designation Procedures for "Protected Information" in *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.* (D.D.C. Nov. 10, 2004) (delineating the procedure for Court approval of protected information requests). Instead, it is respondents' understanding that the Privilege Team marks certain types of unclassified information with more specific identifying notations – such as "For Official Use Only" or "Protected Information" – merely to alert petitioners' counsel that, while the information is unclassified, it may be deserving of special status or treatment in accordance with government information classification guidelines or it is similar in nature to protected information that has previously been designated by respondents' under the Court's November 10, 2004.[13] *See supra* note 12. Therefore, the Privilege Team is simply providing petitioners' counsel with additional information about the type of unclassified information in their possession so they can handle it accordingly until the information is determined by the Court or respondents to have a different classification level, if warranted. Nothing in the Protective Order or Access Procedures prohibits the Privilege Team from marking information in this fashion.

In sum, the Privilege Team has authority under both the Protective Order and Access

[13] The Privilege Team's memorandum, *see* Petitioner's Motion to Compel, Exhibit I, also makes clear that the FOUO designation can be simply a proxy used by the Privilege Team to indicate information may fal in the "protected" category.

Procedures to mark information submitted for review as "protected information."[14]

CONCLUSION

For the reasons stated above, petitioner's emergency motion for injunction against further torture should be denied.

Dated: March 8, 2006

Respectfully submitted,

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[14] Unrelated to their motion to compel, petitioners assert various stale complaints about the timing of legal mail delivery to and from Guantanamo. *See* Petitioners' Motion to Compel at 8-9. While there were some significant delays associated with a number of legal mail packages sent from Guantanamo this past summer, such delays were due to the inadvertent use by certain mailroom personnel at Guantanamo of an incorrect zip code that resulted in packages not being delivered in a timely fashion to the Court Security Officers ("CSOs") responsible for distribution of detainee legal mail to counsel in the secure facility. Once the problem was discovered in August 2005, the CSOs and respondents' counsel were able to track down and retrieve the misrouted packages for delivery, albeit significantly delayed, to petitioners' counsel. Prophylactic steps, in cooperation with the CSOs, have been take to avoid a repeat of the inadvertent error in the future. In any event, petitioners' fail to mention a pilot program designed to provide faster and more efficient delivery of legal mail delivery to represented detainees via FedEx and Lynx Air that has been initiated over the past several months.

Petitioners also reference another stale incident in December 2004 (not 2005, as cited in their motion) involving a single package of interview notes that did not arrive at the security facility. Respondents a year ago provided the assigned Judge in that case – Judge Walton – with an explanation of that unfortunate event in response to petitioners' motion to compel. *See* Respondents' Opposition to Motion to Compel, *Almurbati v. Bush*, 05-CV-1227 (RBW) (dkt. no. 81). Judge Walton has denied all pending motions without prejudice, including the aforementioned motion to compel, until the D.C. Circuit resolves the jurisdictional issues created by the Detainee Treatment Act of 2005. *See* Order, *Almurbati v. Bush*, 05-CV-1227 (RBW) (dkt. no. 149).

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EXHIBIT 1

[ORAL ARGUMENT SCHEDULED FOR MARCH 22, 2006]

Nos. 05-5064, 05-5095 through 05-5116
Nos. 05-5062, 05-5063

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KHALED A.F. AL ODAH, et al.,
Petitioners-Appellees/Cross-Appellants,
v.
UNITED STATES OF AMERICA, et al.,
Respondents-Appellants/Cross-Appellees.

LAKHDAR BOUMEDIENE, et al.,
Petitioners-Appellants,
v.
GEORGE W. BUSH, et al.,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF OF THE FEDERAL PARTIES ADDRESSING THE DETAINEE TREATMENT ACT OF 2005

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GLOSSARY

ARB . . . . . Administrative Review Board

AEDPA . . . . . Antiterrorism and Effective Death Penalty Act

AUMF . . . . . Authorization for Use of Military Force

CSRT . . . . . Combatant Status Review Tribunal

JA . . . . . Joint Appendix

IN THE UNITED STATES COURT OF APPEALS
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF OF THE FEDERAL PARTIES ADDRESSING THE DETAINEE TREATMENT ACT OF 2005

The government files this Supplemental Brief pursuant to the Court's order of January 27, 2006.

STATEMENT OF JURISDICTION

Petitioners are aliens detained by the Department of Defense at Guantanamo Bay, Cuba. Their detention is based on decisions by military Combatant Status Review Tribunals (CSRTs) that petitioners are enemy combatants against the United States. Petitioners sought to challenge their detention in the District Court for the District of Columbia, and they invoked that court's jurisdiction under 28 U.S.C. §§ 1331 and 2241.

The Government filed motions to dismiss the claims of all detainees. In the orders under review here, the district court in Al Odah granted the motions in part and denied them in part, and the district court in Boumediene granted the motions in full. When these appeals were initially briefed and argued, this Court had jurisdiction in Al Odah under 28 U.S.C. § 1292(b), and it had jurisdiction in Boumediene under 28 U.S.C. § 1291.

On December 30, 2005, while the appeals remained pending, Congress enacted the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005). As explained in this brief, that Act grants this Court exclusive jurisdiction to review the CSRT decisions to detain petitioners as enemy combatants. At the same time, the Act eliminates any other jurisdictional basis, including habeas corpus, for this Court or the district court to consider petitioners' claims.

STATEMENT OF THE ISSUES

1. Whether Section 1005 of the Detainee Treatment Act applies to cases pending on the date of its enactment, including these cases.

2. Whether Section 1005 of the Detainee Treatment Act violates the Suspension Clause of the Constitution.

3. If the Act applies here, whether these appeals should be dismissed for lack of jurisdiction or converted into petitions for review under the Act.

STATEMENT OF THE CASE

These appeals involve challenges to the detention of aliens as enemy combatants outside the sovereign territory of the United States during ongoing armed conflict. In Rasul v. Bush, 542 U.S. 466 (2004), the Supreme Court held that the federal habeas corpus statute extends to aliens detained as enemy combatants on a United States military base at Guantanamo Bay, Cuba. In the wake of that decision, more than 200 habeas corpus actions involving more than 300 Guantanamo Bay detainees have been filed. In these appeals alone, petitioners have raised claims under the Fifth Amendment, the Authorization for Use of Military Force (AUMF), the federal habeas statute, and the Third and Fourth Geneva Conventions. They have asserted that any military process used to identify alien enemy combatants abroad must afford protections akin to those in domestic criminal trials, including private

lawyers, access to classified information, and exclusionary rules and suppression hearings. Absent such protections, petitioners have asserted that the federal habeas statute of its own force entitles detainees to, among other things, sweeping discovery followed by de novo trials. They have urged the district courts to enjoin interrogations by military intelligence officers, appoint special masters, and assume responsibility for conditions at Guantanamo Bay ranging from the speed of internet communications for habeas counsel to the delivery of mail for detainees. One of the coordinating counsel for petitioners proudly boasted that this litigation "is brutal" for ongoing United States military operations at Guantanamo Bay. See 151 Cong. Rec. S14256, S14261 (Dec. 21, 2005).

Congress responded to this unprecedented litigation crisis with the Detainee Treatment Act, which became effective on December 30, 2005. Section 1005(e)(1) of that Act amends the federal habeas corpus statute to provide that "no court, justice, or judge shall have jurisdiction" to consider either (1) habeas petitions filed by aliens detained by the Department of Defense at Guantanamo Bay, or (2) any other action relating to any aspect of the detention of such aliens. Section 1005(e)(2) of the Act states that this Court "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," and it further specifies the scope and intensiveness

of that review. Section 1005(e)(1) was made immediately effective without reservation for pending cases, and Section 1005(e)(2) was made expressly applicable to pending cases.

On January 27, 2006, this Court ordered full briefing and oral argument on the effect of the Detainee Treatment Act on these cases. In prior briefing, petitioners have urged that the Act has no effect on these cases, both because it is assertedly inapplicable to any Guantanamo habeas cases pending on the date of its enactment, and because it assertedly violates the Suspension Clause of the Constitution. We address those issues in this brief. In addition, the Court instructed the parties to address the appropriate disposition of these appeals, assuming that the Act applies.

PROVISIONS AT ISSUE

The Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006 (2005), is included as an Addendum to this brief.

STATEMENT OF FACTS

1. On September 11, 2001, the United States endured the most deadly and destructive foreign attack in its history. That morning, members of the al Qaeda terrorist network hijacked four commercial airliners and crashed three of them into targets in the Nation's financial center and its seat of government. The attacks killed

almost 3,000 people, injured thousands more, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President took immediate action to defend the country and prevent additional attacks, and Congress swiftly approved his use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

The President ordered United States Armed Forces to subdue both the al Qaeda terrorist network and the Taliban regime that had harbored it in Afghanistan. Although our troops have removed the Taliban from power and dealt al Qaeda forces a heavy blow, armed combat against these enemies unfortunately remains ongoing. Many courageous Americans have been killed or wounded in combat, and many more continue to put themselves in harm's way in order to defeat al Qaeda and the Taliban, and to protect this Nation from further attacks.

During these conflicts, the United States has seized thousands of hostile fighters. Consistent with the law and settled practice of armed conflict, it has detained a small proportion of them as enemy combatants. Approximately 490 of

these enemy combatants are being held at the United States Naval Base at Guantanamo Bay, Cuba. Each of them was captured abroad and is an alien.

2. Each Guantanamo Bay detainee has received a formal adjudicatory hearing before a Combatant Status Review Tribunal. Those tribunals, established pursuant to written orders under the authority of the Secretary of Defense, were created specifically "to determine, in a fact-based proceeding, whether the individuals detained * * * at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation." Al Odah JA 1191.

During the CSRT proceedings, each detainee received substantial procedural protections modeled upon those provided in detention hearings under regulations implementing the Third Geneva Convention. Among other things, each detainee received notice of the unclassified factual basis for his designation as an enemy combatant and an opportunity to testify, call witnesses, and present relevant and reasonably available evidence. Al Odah JA 1197. Each detainee also received assistance from a military officer designated as his "personal representative for the purpose of assisting the detainee in connection with the [CSRT] review process." Id. at 1187. Another military officer, the recorder of each tribunal, was required to present any evidence that might "suggest that the detainee should not be designated

as an enemy combatant." Id. at 1203. Each tribunal consisted of three military officers sworn to render an impartial decision and in no way "involved in the apprehension, detention, interrogation, or previous determination of status of the detainees." Id. at 1194. Each tribunal decision was subject to mandatory review first by the CSRT Legal Advisor and then the CSRT Director. Id. at 1202. Out of the 558 CSRT hearings conducted, 38 resulted in determinations that the detainee in question was not an enemy combatant. See CSRT Summary, http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf.

Each detainee not subject to trial before a military commission also receives an annual hearing before an Administrative Review Board (ARB). The Secretary of Defense established these tribunals to assess whether the detainee remains a threat to the United States and its allies in the ongoing armed conflicts with the Taliban and al Qaeda. See Administrative Review Implementation Directive, http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf. The ARB is selected by and reports to a "designated civilian official," who is a Presidentially-appointed and Senate-confirmed officer in the Department of Defense designated by the Secretary of Defense. Id.

The ARBs also afford substantial procedural protections. A designated military officer provides the Board "all reasonably available threat information" in

the possession of the Department of Defense and any other information indicating whether it would be in the interest of the United States or its allies to continue to detain or release the detainee. Id. The detainee receives a written unclassified summary of this information before the hearing, and may present evidence on his own behalf. Id. A military officer is assigned to assist the detainee. Id. Unless inconsistent with national security, the home government of the detainee receives notice of and may provide information at the hearing. Id. The Board may seek additional facts and must issue a written recommendation whether detention should be continued. Id. The designated civilian official makes the final detention determination. Id. To date, ARB proceedings have resulted in the release or transfer of 29 detainees from Guantanamo Bay. See ARB Summary, http://www.defenselink.mil/news/Jan2006/d20060130arb.pdf; ARB-2 Summary, http://www.defenselink.mil/news/Jan2006/d20060216arb2.pdf.

3. In early 2002, a few Guantanamo detainees filed habeas corpus actions to challenge their detention as enemy combatants. In Rasul v. Bush, 215 F. Supp. 2d 55, 65-73 (D.D.C. 2002), the district court dismissed two such actions on the ground that, under Johnson v. Eisentrager, 339 U.S. 763 (1950), neither the federal habeas statute (28 U.S.C. § 2241) nor the general federal question statute (28 U.S.C. § 1331) extends habeas corpus jurisdiction to aliens held outside the sovereign territory of the

United States. This Court affirmed the jurisdictional dismissal. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003). Citing Eisentrager, it agreed that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees." Id. at 1141.

The Supreme Court reversed this Court on jurisdictional grounds and remanded the cases to the district court. Rasul v. Bush, 542 U.S. 466 (2004). The Court reasoned that, on the question of "statutory jurisdiction" under 28 U.S.C. § 2241, Eisentrager had implicitly rested on the narrow construction of the habeas statute adopted in Ahrens v. Clark, 335 U.S. 188 (1948), and was therefore implicitly overruled on that question by Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973). See Rasul, 542 U.S. at 476-79. The Court further reasoned that the text of the habeas statute, which was conceded to apply extraterritorially to American citizens at Guantanamo Bay, "draws no distinction between Americans and aliens." Id. at 481. Finally, after "hold[ing] that § 2241 confers * * * jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base," the Court adopted a parallel construction of 28 U.S.C. § 1331. Id. at 483-85. The Court concluded its opinion by stressing that it had decided "only whether the federal courts have jurisdiction," and it expressly declined to address "the merits of petitioners' claims." See id. at 485.

4. After the remand in Rasul, numerous other Guantanamo detainees filed their own habeas petitions. By the end of July 2004, 13 cases involving more than 60 detainees were pending in the district court and consolidated for limited procedural purposes. Al Odah JA 1239. The Government filed motions to dismiss in each of these cases, which are the subject of the two pending appeals.

In 11 cases including Al Odah, Judge Green granted in part and denied in part the motions to dismiss. Al Odah. JA 1228-1302. She concluded that the Fifth Amendment applies extraterritorially to aliens held at Guantanamo Bay (id. at 1245-65) and that the CSRT procedures fail to satisfy the Due Process Clause of that Amendment (id. at 1265-95). She identified three perceived flaws in the CSRT procedures: first, that detainees were not given private attorneys with access to classified information; second, that in some cases the CSRT might not have sufficiently considered whether evidence was the product of coercion; and third, that the definition of "enemy combatant" used by the CSRTs was potentially vague or overbroad. Ibid. Given those perceived flaws, she held that the habeas courts have an "obligation * * * to provide the petitioner with a fair opportunity to challenge the government's factual basis for his detention." Id. at 1295. She further held that the Third Geneva Convention is judicially enforceable at the behest of individual detainees and that it protects members of the Taliban but not members of al Qaeda.

Id. at 1296-97. She dismissed various other constitutional, statutory, and treaty claims brought by the petitioners. Id. at 1300-01. Finally, she certified her order for an interlocutory appeal, which this Court accepted.

In two cases including Boumediene, Judge Leon granted the motions to dismiss in their entirety. Boumediene JA 999-1032.[1] He held that petitioners' detention is affirmatively authorized by the AUMF and consistent with the President's constitutional powers as Commander-in-Chief. Id. at 1007-12. He further held that the Constitution does not protect aliens outside United States sovereign territory, including aliens held at Guantanamo Bay. Id. at 1012-19. And he held that none of the statutes, regulations, and treaties cited by petitioners creates judicially enforceable individual rights. Id. at 1019-26. The Boumediene petitioners took an appeal from that final judgment.

This Court consolidated the Al Odah and Boumediene appeals for purposes of oral argument, which was held on September 8, 2005.

5. During the pendency of these appeals, habeas filings have continued to accelerate. To date, more than 200 cases have been filed, purportedly on behalf of some 600 detainees. Although some of these filings appear duplicative, and others

[1] The second case became moot when its only appellant, petitioner Ridouane Khalid, was released from Guantanamo Bay and repatriated to France.

name petitioners who cannot be matched with actual detainees, the number of detainees with pending petitions is well over 300. The Department of Defense has been forced to reconfigure its operations at the Guantanamo Naval Base to accommodate hundreds of visits by private habeas counsel. The detainees have urged habeas courts to dictate conditions on the Base ranging from the speed of Internet access afforded their lawyers to the extent of mail delivered to detainees. This habeas litigation has consumed enormous resources and disrupted the day-to-day operation of the Guantanamo Naval Base.

Perhaps most disturbing, the habeas litigation has imperiled crucial military operations during a time of war. In some instances, habeas counsel have violated protective orders and jeopardized the security of the Base by giving detainees information likely to cause unrest. Moreover, habeas counsel have frustrated interrogations critical to preventing further terrorist attacks on the United States. One of the coordinating counsel for the detainees boasted about this in public: "The litigation is brutal for [the United States]. It's huge. We have over one hundred lawyers now from big and small firms working to represent these detainees. Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they're doing. You can't run an interrogation * * * with attorneys. What

are they going to do now that we're getting court orders to get more lawyers down there?" See 151 Cong. Rec. S14256, S14260 (Dec. 21, 2005).

6. In response to this litigation crisis, Congress enacted the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005). The President signed the Act into law on December 30, 2005. Section 1005 of the Act, the provision at issue here, divests the courts of habeas jurisdiction in cases involving the Guantanamo detainees, but gives this Court exclusive jurisdiction to review both the CSRT determinations by which the detainees are held as enemy combatants and any criminal convictions of the detainees rendered by military commissions.

Section 1005(e)(1) effects the repeal of habeas jurisdiction. It expressly amends the habeas statute, 28 U.S.C. § 2241, to state that "no court, justice, or judge shall have jurisdiction to hear or consider" two specified categories of cases, except as provided by the Act itself. The first category of cases encompasses any "application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." §1005(e)(1). The second category of cases encompasses "any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba," if the detainee is currently in military custody or

has been determined under the review procedures established by the Act to have been properly detained as an enemy combatant. Id.

Section 1005(e)(2) of the Act replaces habeas jurisdiction with an exclusive-review mechanism in this Court. It confers upon this Court "exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." § 1005(e)(2)(A). Section 1005(e)(2) also specifies the governing "scope of review," by stating that this Court may determine whether a final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C).

Section 1005(e)(3) creates an exclusive-review mechanism for Guantanamo detainees seeking to challenge criminal convictions rendered by military commissions. It confers upon this Court "exclusive jurisdiction to determine the validity of any final decision" rendered by a military commission, § 1005(e)(3)(A), and, in a correlative "scope of review" provision, it authorizes this Court to determine whether a military commission decision "was consistent with the standards and procedures specified" in the governing Executive Orders and "to the extent the

Constitution and laws of the United States are applicable, whether the use of such standards and procedures is consistent with the Constitution and laws of the United States," § 1005(e)(3)(D).

Section 1005(h), titled "effective date," contains two provisions. The first provision states that Section 1005, including its elimination of statutory habeas jurisdiction, is effective immediately. § 1005(h)(1) ("This section shall take effect on the date of the enactment of this Act."). The second provision makes this Court's exclusive jurisdiction over challenges to CSRT and military commission decisions expressly applicable to pending cases. § 1005(h)(2) ("Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.").

SUMMARY OF ARGUMENT

The Detainee Treatment Act applies to these appeals, is constitutional, and mandates conversion of the appeals into petitions for review under the Act.

I. The Detainee Treatment Act plainly applies to these appeals. By its terms, the Act creates an exclusive-review mechanism that permits the Guantanamo detainees to challenge their CSRT determinations in this Court. § 1005(e)(2). At the same time, the Act expressly eliminates all other sources of jurisdiction, including

habeas corpus, by which the detainees might challenge any aspect of their detention. § 1005(e)(1). The Act makes the exclusive-review scheme expressly applicable to claims pending on the date of its enactment, § 1005(h)(2), and it makes the repeal of alternative sources of jurisdiction effective immediately and without reservation for pending cases, § 1005(h)(1). In tandem, these provisions govern the pending appeals.

Exclusive-review schemes, like the one created by Section 1005(e)(2), by their very nature preclude courts from exercising jurisdiction under alternative and more general grants of jurisdiction, including habeas corpus. Moreover, the exclusive-review scheme created by Section 1005(e)(2) is expressly applicable to claims governed by the scheme and pending on the date of its enactment. That alone forecloses the exercise of habeas jurisdiction in these cases. Petitioners' contention that Section 1005(e)(2) governs only challenges to future CSRT decisions is belied by the text of the Act, which makes the exclusive-review scheme govern challenges to "any" CSRT decision "pending on" the date of its enactment.

Moreover, without reservation for pending cases, Section 1005(e)(1) of the Act expressly and immediately eliminates every other jurisdictional basis – including specifically habeas corpus – through which the Guantanamo detainees might challenge their detention. Under settled interpretive principles, such jurisdiction-ousting statutes apply to pending cases. Petitioners err in contending that Section

1005(e)(1), which addresses only the future exercise of judicial power, and which does not preclude the Guantanamo detainees from challenging their detention either under Section 1005(e)(2) or through the ARBs, would be impermissibly retroactive if given immediate effect in pending cases.

Petitioners also err in contending that the combination of Section 1005(e)(1) and Section 1005(e)(2), each of which independently precludes the continuing exercise of habeas jurisdiction in these cases, somehow accomplishes exactly the opposite. All of petitioners' arguments fail on their own terms. Moreover, their assertion that Congress intended for its exclusive-review scheme to govern only the possibly-null set of future CSRT determinations, and to be wholly inapplicable to the hundreds of pending Guantanamo habeas cases, is nonsensical given the circumstances surrounding the Act's passage.

II. The Act is fully consistent with the Suspension Clause of the Constitution. As aliens held outside the sovereign territory of the United States, petitioners have no constitutional rights under the Suspension Clause or otherwise. But even if they did, the elimination of habeas review would still be permissible because Section 1005(e)(2) provides an adequate substitute remedy through which petitioners can challenge their detention as enemy combatants. Decisions about the scope of habeas corpus, or any substitute, ordinarily are for Congress. Section 1005(e)(2) permits this

Court to determine not only whether the CSRT followed its own procedures, but also whether the use of such procedures is consistent with the Constitution and federal law. Given the extensiveness of the CSRT procedures, and the historical traditions governing the detention of enemy combatants during armed conflict, that review is more than constitutionally sufficient.

III. Because the Act applies to these cases, this Court can exercise no jurisdiction other than that afforded by the exclusive-review provisions of Section 1005(e)(2). To avoid the wasteful exercise of dismissal and re-filing, the Court can and should recast the pending appeals as petitions for review under Section 1005(e)(2) – a disposition expressly anticipated by Congress. The Court should then proceed to decide the issues raised by petitioners that fall within the scope of its review under Section 1005(e)(2), including Fifth Amendment and AUMF claims that have already been fully briefed and argued. Finally, because neither this Court nor the district court has continuing jurisdiction over the pending habeas petitions, the Court should vacate the judgments of the district court in those cases and remand the cases with instructions to dismiss.

ARGUMENT

I. THE DETAINEE TREATMENT ACT APPLIES TO, AND RESTRICTS JURISDICTION IN, THESE PENDING CASES

It is hornbook law that jurisdiction must exist throughout the pendency of litigation. "'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause.'" Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (quoting Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)). Moreover, "'[e]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review."'" Id. at 95 (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 73 (1997) (in turn quoting Mitchell v. Maurer, 293 U.S. 237, 244 (1934))).

The Detainee Treatment Act plainly ousts the courts of jurisdiction in these pending cases, except as provided in the Act itself. In independent but mutually reinforcing provisions, the Act removes preexisting sources of jurisdiction in two ways: by creating an exclusive-review scheme under which the Guantanamo detainees may challenge their CSRT determinations directly in this Court; and by expressly eliminating all other sources of jurisdiction, including habeas corpus, in

cases involving the Guantanamo detainees. The exclusive-review scheme is expressly applicable to pending cases, and the provision eliminating other sources of jurisdiction contains no reservation for pending cases. Together these provisions require dismissal to the extent that the pending appeals rest on 28 U.S.C. §§ 1291 and 1292(b), and they preclude any continuing exercise of district court jurisdiction in these cases.

A. This Act Gives This Court "Exclusive" Jurisdiction Over Claims By The Guantanamo Detainees "Pending On" The Date Of Its Enactment

1. By its terms, Section 1005(e)(2) of the Detainee Treatment Act states that this Court "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." § 1005(e)(2)(A). That "exclusive" jurisdiction plainly covers the habeas actions giving rise to these appeals: in contending that their detention is unlawful, petitioners necessarily challenge the "validity" of the CSRT decisions that each of them "is properly detained as an enemy combatant." Moreover, the Act makes this "exclusive" jurisdiction expressly applicable to pending cases: Section 1005(h)(2) states that Section 1005(e)(2) "shall apply with respect to any claim whose review is governed by" Section 1005(e)(2) "and that is pending on or after the date of the enactment of this Act." By its very nature, this scheme of "exclusive" review

precludes resort to other grants of jurisdiction such as the habeas statute or the general federal question statute.

Exclusivity is particularly appropriate given the precise and reticulated nature of Section 1005(e)(2), which is specific to Guantanamo detainees held as enemy combatants pursuant to CSRT decisions, and which contains its own detailed limitations provisions and standards of review. It is well-settled that such an exclusive-review scheme, where applicable, precludes the exercise of jurisdiction under more general grants of jurisdiction, including habeas corpus. See, e.g., 5 U.S.C. § 703 ("form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for * * * writs of * * * habeas corpus"); Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207-09 (1994) ("exclusive" jurisdiction under federal Mine Act precludes assertion of district court jurisdiction); FCC v. ITT World Communications, Inc., 466 U.S. 463, 468 (1984) (Hobbs Act) ("The appropriate procedure for obtaining judicial review of the agency's disposition of these issues was appeal to the Court of Appeals as provided by statute."); Laing v. Ashcroft, 370 F.3d 994, 999-1000 (9th Cir. 2004) ("§ 2241 is ordinarily reserved for instances in which no other judicial remedy is available"); Lopez v. Heinauer, 332 F.3d 507, 511 (8th Cir. 2003) ("Because judicial

review was available * * * the district court was not authorized to hear this § 2241 habeas petition."). Indeed, the same principles apply even if Congress does not explicitly state that the more specific review mechanism is exclusive. See, e.g., United States v. Erika, Inc., 456 U.S. 201, 205-08 (1982) (Medicare review scheme precludes exercise of Tucker Act jurisdiction); Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 77 (D.C. Cir. 1984) ("even where Congress has not expressly stated that statutory jurisdiction is 'exclusive' * * *, a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute") (footnote omitted).

2. In prior briefing, petitioners have urged that Section 1005(e)(2) governs review only of CSRT decisions rendered after, rather than before, the date of its enactment. Petitioners note that, although Section 1005(e)(2) encompasses review of "any final decision of a Combatant Status Review Tribunal," § 1005(e)(2)(A), it is qualified by a limitations provision restricting that jurisdiction, in pertinent part, to aliens "for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense," § 1005(e)(2)(B)(ii). Petitioners further note that the Act requires the Secretary to submit the governing CSRT and ARB procedures to Congress not later than 180 days after its enactment, § 1005(a)(1)(A), and that it specifies particular protections for the

submitted procedures, §§ 1005(a)(2), 1005(a)(3), 1005(b). From all of this, petitioners conclude that Section 1005(e)(2) applies only to those future CSRT decisions that afford the new statutory protections.

Petitioners' argument is wholly unconvincing. To begin with, it is inconsistent with Section 1005(h)(2), which makes this Court's exclusive jurisdiction to review challenges to CSRT decisions expressly applicable to "any claim * * * that is pending on or after the date of the enactment of this Act." That language extends Section 1005(e)(2) not only to future challenges to future CSRT decisions, but also to present challenges to past CSRT decisions "pending on" the date of enactment. Petitioners' contrary construction, which would limit the Act to review of future CSRT decisions, would improperly deprive the "pending on" language of any meaningful effect. See Beck v. Prupis, 529 U.S. 494, 506 (2000) ("a statute should not be construed so as to render any provision of that statute meaningless or superfluous"). This understanding is reinforced by the temporal-scope provision in Section 1005(b), which imposes a specific requirement for the procedures submitted to Congress (§ 1005(b)(1)), but states that the requirement only "applies with respect to any proceeding beginning on or after the date of the enactment of this Act" (§ 1005(b)(2)). Petitioners' reading of the Act would collapse Congress's careful temporal distinction between Section 1005(b), which applies to CSRT proceedings "beginning on or after" the date of

enactment, and Section 1005(e)(2), which applies to CSRT challenges "pending on or after" the date of enactment.

The textual provisions cited by petitioners do not support their reasoning. First, it is implausible that Congress would give this Court exclusive jurisdiction to review "any final decision of a Combatant Status Review Tribunal" (§ 1005(e)(2)(A)) – a formulation that plainly encompasses the 558 past CSRT decisions – only to eliminate that jurisdiction in its entirety, in a subordinate clause in a subsequent limitations provision, by elliptical reference to CSRTs "pursuant to applicable procedures specified by the Secretary of Defense" (§ 1005(e)(2)(B)(ii)). As the Supreme Court repeatedly has instructed, Congress "'does not, one might say, hide elephants in mouseholes.'" Gonzales v. Oregon, 126 S. Ct. 904, 921 (2006) (quoting Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001)). In any event, petitioners are simply wrong to the extent they suggest that past CSRTs were not conducted under "procedures specified by the Secretary of Defense." To be sure, the initial order establishing the CSRTs was signed by the Deputy Secretary of Defense. See Al Odah JA 1187-90. But Congress has authorized the Secretary of Defense to "exercise any of his powers through" designated subordinates, see 10 U.S.C. § 113(d), and the Secretary has delegated to the Deputy Secretary the "full power and authority to act for the Secretary of Defense and to exercise the powers of the

Secretary of Defense upon any and all matters concerning which the Secretary of Defense is authorized to act pursuant to law," see 32 C.F.R. § 341.1 (2002); accord Department of Defense Directive 5105.02 (2006). Moreover, in a subsequent memorandum implementing the CSRT order, the Secretary of the Navy confirmed that "the Secretary of Defense has established a Combatant Status Review Tribunal (CSRT) process." Al Odah JA 1191.

Petitioners fare no better in invoking the Act's reporting provisions. The Act requires the Secretary to submit to Congress a report setting forth the "procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay." § 1005(a)(1)(A). To the extent it is relevant at all, that provision suggests that the Act uses the term "Combatant Status Review Tribunals" in its ordinary sense, to encompass not only whatever CSRTs may be conducted in the future, but also the hundreds of CSRTs actually conducted in the past.

Finally, the three protections mandated by the Act, which require only small adjustments to the existing CSRT and ARB procedures, cannot bear the weight that petitioners would place on them. First, the Act requires future CSRT and ARB decisions to be reviewed by a "designated civilian official" appointed by the President and confirmed by the Senate. § 1005(a)(2). Petitioners' CSRT decisions were

reviewed by a CSRT Director (Al Odah JA 1202), who was a Presidentially-appointed and Senate-confirmed military officer with the rank of Rear Admiral (id. at 1212). Moreover, their future annual ARBs will be reviewed by a "designated civilian official" pursuant to the Act, just as they would have been under existing ARB procedures, see Administrative Review Implementation Directive, http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf. Second, the Act requires "periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee." § 1005(a)(3). Existing ARB procedures afford analogous review. See Administrative Review Implementation Directive, supra. Third, in a provision made explicitly prospective, the Act requires future CSRTs and ARBs, "to the extent practicable," to assess whether any statement about a detainee "was obtained as a result of coercion" and, if so, "the probative value (if any) of any such statement." § 1005(b). Petitioners' CSRTs were permitted to consider statements about the detainee, but only after "taking into account the reliability of such evidence in the circumstances" presented. Al Odah JA 1189, 1199. Petitioners' suggestion that Congress would have created an elaborate exclusive-review scheme to govern challenges to any future CSRTs, but exempted from that scheme challenges to any of the 558 completed CSRTs, based on differences as small as these, is absurd given the circumstances surrounding enactment of the Act.

Petitioners' view – that they can maintain their pending habeas actions and bring new challenges to any future CSRTs under Section 1005(e)(2) – would drastically increase the burden on the Department of Defense and the courts, in contravention of the Act's language and clear purpose.

By its terms, the Act gives this Court "exclusive" jurisdiction to review "any final decision of a Combatant Status Review Tribunal," § 1005(e)(2)(A), including past CSRT decisions giving rise to claims "pending on * * * the date of [its] enactment," § 1005(h)(2). Petitioners' cases fall squarely within these provisions. On this ground alone, the Act bars the exercise of any other jurisdiction.

B. The Act Eliminates Habeas Jurisdiction Without Any Reservation For Pending Cases

1. The Detainee Treatment Act bars the exercise of other jurisdiction in these cases in a second, independent way as well. Section1005(e)(1) amends the habeas statute to state that, except as provided for in the Act itself, "no court, justice, or judge shall have jurisdiction to hear or consider" either (1) "an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay," or (2) "any other action against the United States or its agents relating to any aspect of the detention" of such an alien, if, in pertinent part, the alien "is currently in military custody." This provision obviously overcomes whatever

interpretive presumption might exist against repeal of the habeas statute. See INS v. St. Cyr, 533 U.S. 289, 298 (2001) (requiring "a clear statement of congressional intent to repeal habeas jurisdiction"). It plainly covers the habeas claims of petitioners, who are "alien[s] detained by the Department of Defense at Guantanamo Bay." It also covers any non-habeas claims petitioners might raise about "any aspect of [their] detention," including challenges to conditions of confinement, because petitioners are "currently in military custody." Finally, Section 1005(e)(1) takes effect immediately, see § 1005(h)(1) ("This section shall take effect on the date of the enactment of this Act."), and makes no reservation for pending cases.

In Landgraf v. USI Film Products, 511 U.S. 244 (1994), the Supreme Court explained at length the interpretive presumptions governing the temporal scope of federal statutes. Landgraf held that, to avoid concerns about unfair retroactivity, statutes governing primary conduct are presumptively inapplicable to cases pending on the date of enactment. See id. at 265-73. At the same time, however, Landgraf stressed that a different rule has always governed statutes addressing the jurisdiction of the courts: "We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." Id. at 274. "Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the

rights or obligations of the parties.'" Id. at 274 (quoting Republic National Bank of Miami v. United States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). In other words, the application of intervening jurisdictional statutes to pending cases is not retroactive at all. See id. at 293 (Scalia, J., concurring in the judgment) ("applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively").

Consistent with these principles, the Supreme Court in Bruner v. United States, 343 U.S. 112 (1952), stated, as a "rule * * * adhered to consistently," that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." Id. at 116-117 & n.8. And that rule applies no matter how far pending litigation has progressed. In Bruner itself, a statute eliminating district court jurisdiction over certain claims was enacted only after the Supreme Court had granted certiorari in the case, yet the Court held that the case must be dismissed for lack of jurisdiction. See id. at 114, 117. The Court explained that, "[a]bsent such a reservation [as to pending cases]," the district court lacked jurisdiction, "even though [the court] had jurisdiction * * * when petitioner's action was brought." Id. at 115.

Earlier decisions are to the same effect. See, e.g., Gallardo v. Santini Fertilizer Co., 275 U.S. 62, 63 (1927) (Holmes, J.) (ordering dismissal because, after the district court had issued an injunction, Congress passed a law "that took away the jurisdiction of the District Court in this class of cases"); Hallowell v. Commons, 239 U.S. 506, 508-509 (1916) (Holmes, J.) (affirming dismissal because, while the action was pending, Congress enacted a jurisdiction-ousting provision that "made no exception for pending litigation"); Sherman v. Grinnell, 123 U.S. 679, 680 (1887) ("'if a law conferring jurisdiction is repealed without a reservation as to pending cases, all such cases fall with the law'") (quoting Railroad Co. v. Grant, 98 U.S. (8 Otto) 398, 401 (1878)); Assessors v. Osbornes, 76 U.S. (9 Wall.) 567, 575 (1869) ("inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress"); Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) ("no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted").

Recent decisions continue to follow these settled rules. Two terms ago, in Republic of Austria v. Altmann, 541 U.S. 677 (2004), the Supreme Court once again reaffirmed "the application to all pending and future cases of 'intervening' statutes that merely 'confe[r] or ous[t] jurisdiction.'" Id. at 693 (quoting Landgraf, 511 U.S. at 274). This Court did the same in LaFontant v. INS, 135 F.3d 158 (D.C. Cir. 1998),

in quoting Landgraf for the proposition that the Court has "'regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.'" Id. at 161 (quoting 511 U.S. at 274). And in Santos v. Territory of Guam, __ F.3d __, 2006 WL 118375 (9th Cir. Jan. 3, 2006), the Ninth Circuit recently applied Bruner to give immediate effect to a jurisdiction-ousting provision, enacted after oral argument in the case, even though Congress had acted "without expressing an intent as to the effective date of its new statute." Id. at *2; see also id. at *4 (Wallace, J., concurring) ("Because there was no 'reservation as to pending cases' in the statute at issue here, we lack jurisdiction over the present appeal.") (quoting Bruner, 343 U.S. at 116).

2. In seeking to avoid this settled precedent, petitioners contend that Section 1005(e)(1) must be treated as substantive rather than jurisdictional for purposes of retroactivity analysis. Petitioners cite Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997), which declined to give immediate effect to False Claims Act amendments eliminating a defense to liability and creating a new cause of action. Although the amendments were phrased in jurisdictional terms, the Court declined to apply them to pending cases. It explained that statutes "merely addressing which court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of the litigation and not the

underlying primary conduct of the parties" – and thus are presumptively applicable to cases pending on the date of enactment. See id. at 951. In contrast, statutes addressing "whether [a suit] may be brought at all" are "substantive" ones presumptively inapplicable to such pending cases. See ibid.

For several reasons, Hughes does not help petitioners. Most obviously, the withdrawal of habeas jurisdiction effected by Section 1005(e)(1) does not deprive petitioners of the ability to obtain review of their detention as enemy combatants. In its entirety, the Act plainly address the "which court" question, not the "whether" question, by replacing district court jurisdiction with exclusive jurisdiction in this Court. Moreover, the rule that jurisdiction-ousting provisions are presumptively applicable to pending cases has never depended on the availability of an alternative judicial forum. In Hallowell, the Supreme Court gave immediate effect, in a case pending on the date of enactment, to a statute that divested the district courts of jurisdiction to review certain administrative determinations made by the Secretary of the Interior. See 239 U.S. at 507-08. Speaking unanimously through Justice Holmes, the Court concluded that the statute "takes away no substantive right," but, by making "final and conclusive" an Executive Branch determination, "simply changes the tribunal that is to hear the case." Id. at 508. This Court applied exactly that reasoning in LaFontant, which gave immediate effect to a statute foreclosing any judicial review

of certain deportation orders. See 135 F.3d at 164-65. This Court treated the statute as jurisdictional for purposes of retroactivity analysis. Applying Hallowell, and distinguishing Hughes, the Court held that a "jurisdictional change from an Article III court to an administrative decision maker is simply a change in the 'tribunal that is to hear the case.'" Id. at 162 (quoting Kolster v. INS, 101 F.3d 785, 788 (1st Cir. 1996)). Accordingly, even if Section 1005(e)(2) were erroneously ignored, Section 1005(e)(1) still would be jurisdictional for retroactivity purposes, because its application would simply change the tribunal authorized to hear detention challenges from a judicial one (the habeas court) to an administrative one (the CSRT and ARB).

Furthermore, whatever default rules of construction might apply in other contexts, the courts have not hesitated to give immediate effect to provisions bearing on critical matters of war and foreign relations. For example, in United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), the Supreme Court gave immediate effect to a treaty addressed to wartime captures and enacted after the court of appeals had rendered its judgment. Although the treaty concededly affected substantive rights, the Court declined to frustrate war objectives by imposing a retroactivity-based clear statement rule. Speaking unanimously through Chief Justice Marshall, the Court explained: "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect

the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation." Id. at 110. Similarly, in Acree v. Iraq, 370 F.3d 41 (D.C. Cir. 2004), Chief Justice (then Judge) Roberts, in addressing a point not reached by the panel majority, would have given immediate effect to a statute restoring the foreign sovereign immunity of Iraq with respect to claims by American servicemembers arising out of war crimes committed by the predecessor Iraqi regime. See id. at 64-65 (opinion concurring in the judgment). The statute restoring Iraq's foreign sovereign immunity would have left the servicemembers with neither a judicial nor an administrative tribunal in which to press their claims, but only with the possibility of future espousal of their claims by the Executive Branch. See id. Nonetheless, Judge Roberts would have applied the statute to the pending claims, based in part on his characterization of the statute as "jurisdictional" under LaFontant and in part on the heightened need for immediate Executive Branch action in the context of warmaking and foreign policy. See ibid. If such considerations can govern the retroactivity analysis of "vested rights" of American citizens (Schooner Peggy, 5 U.S. (1 Cranch) at 110), and of wartime claims

by American citizens against a former adversary, then surely they can also govern the retroactivity analysis of a statute addressed to the litigation of wartime claims against this country by aliens held as enemy combatants.

Finally, to the extent the Act arguably has substantive effects, they arise not from the substitution of one review mechanism for another, but from the scope-of-review provision in Section 1005(e)(2), which Congress made expressly applicable to covered claims "pending on or after the date of the enactment" of the Act. § 1005(h)(2). Regardless of the governing default presumption, that kind of clear language compels application of the Act to pending cases in any event. See Landgraf, 511 U.S. at 280 ("When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules."). Considered individually or together, Section 1005(e)(1), which eliminates habeas jurisdiction without reservation for pending cases, and Section 1005(e)(2), which provides an alternative and exclusive review mechanism that is expressly applicable to pending cases, foreclose the exercise of all other sources of jurisdiction in these cases.

C. Petitioners' Other Arguments For Continuing Habeas Jurisdiction Lack Merit

As we have shown, Section 1005(e)(1) and Section 1005(e)(2) each independently forecloses the continuing exercise of habeas and other district court jurisdiction here. Petitioners err in contending that these provisions, construed together, somehow preserve that jurisdiction.

1. Petitioners focus primarily on the contrast in the two "effective date" provisions in Section 1005(h). As noted above, one of them states that the schemes for exclusive review of CSRT and military commission decisions in this Court "shall apply with respect to any claim whose review is * * * pending on or after the date of the enactment of this Act," § 1005(h)(2), while the other states only that the repeal of habeas and other jurisdiction (among other provisions) "shall take effect on the date of the enactment," § 1005(h)(1). From this, petitioners conclude that the repeal of habeas jurisdiction does not apply to cases pending on the date of enactment.

Petitioners' argument fails in several respects. For the reasons explained above, it ignores that the exclusive-review provisions in Section 1005(e)(2), which expressly apply to pending cases, are themselves sufficient to preclude resort to habeas jurisdiction, and it ignores the background rule that a jurisdiction-ousting statute, such as Section 1005(e)(1), applies to pending cases absent any express

reservation for pending cases. Congress thus had no reason to state explicitly that Section 1005(e)(1) applies to pending cases, given this "predictable background rule against which to legislate." See Landgraf, 511 U.S. at 273. In contrast, Congress had very good reason to specify the temporal scope of Section 1005(e)(2) and Section 1005(e)(3). Those provisions create jurisdiction and specify the governing scope of review. For that reason, their proper characterization for retroactivity purposes, much like the proper characterization of burdens of proof, is far less obvious than is the proper characterization of Section 1005(e)(1), which does nothing besides oust jurisdiction. See, e.g., Lindh v. Murphy, 521 U.S. 320, 327 (1997) (while statute "chang[ing] standards of proof and persuasion" in the State's favor "might not have a true retroactive effect, neither [is] it clearly 'procedural'"); Landgraf, 511 U.S. at 268 ("deciding when a statute operates 'retroactively' is not always a simple or mechanical task"). The contrast between Section 1005(h)(1) and Section 1005(h)(2) thus cannot support any reasonable inference that Section 1005(e)(1) is inapplicable to pending cases (despite the default presumption to the contrary) and that Section 1005(e)(2) is inapplicable to pending cases (despite an express statement that it is).

2. For similar reasons, petitioners cannot claim support from Lindh. That case involved construction of the habeas provisions in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which amended Chapter 153 of Title 28 and

created a new Chapter 154. Although the provisions governing both chapters address "standards affecting entitlement to relief," AEDPA made Chapter 154 expressly applicable to petitions pending on the date of its enactment, but contained no parallel provision for its amendments to Chapter 153. See 521 U.S. at 329. Relying on a negative implication, the Court held Chapter 153 inapplicable to pending petitions because, in its view, "[n]othing * * * but a different intent explains the different treatment" of otherwise parallel provisions. Ibid.

"The same negative inference does not arise," Martin v. Hadix, 527 U.S. 343, 356 (1999), where the provisions at issue lack the parallelism that was dispositive in Lindh. In Hadix, the Court rejected application of the Lindh inference because the two provisions at issue addressed different subject matter and served different purposes. See id. at 356-57. So too here: The relevant provisions of the Act are not sufficiently similar to support any "negative inference," because Section 1005(e)(1) simply withdraws jurisdiction, whereas Section 1005(e)(2) creates jurisdiction and attaches a "limitation on claims," § 1005(e)(2)(B), and specifies a governing "scope of review," § 1005(e)(2)(C). In that respect, Section 1005(e)(2) and Section 1005(e)(3) are identical. See § 1005(e)(3)(C) ("limitation on appeals"); § 1005(e)(3)(D) ("scope of review"). Section 1005(e)(2) and Section 1005(e)(3) thus might well have been seen as addressing substantive issues, as Lindh itself suggests.

See 521 U.S. at 327. In contrast, courts post-Lindh have consistently continued to apply the rule that jurisdiction-ousting provisions are presumptively applicable to pending cases. See, e.g., Altmann, 541 U.S. at 692-93; Santos, 2006 WL 118375 at *2; LaFontant, 135 F.3d at 162-63 (distinguishing Lindh). Because Congress could readily have been more concerned about affirmatively ensuring the immediate applicability of Section 1005(e)(2) and of Section 1005(e)(3) than that of Section 1005(e)(1), the Lindh inference by its own terms inapposite.

Finally, given the subject matter of the provisions at issue here, the Lindh inference is simply nonsensical. Petitioners effectively contend that Congress, in making an exclusive-review scheme expressly applicable to pending cases, somehow manifested an intent to preserve habeas jurisdiction over the same class of cases. To state that proposition is to refute it.

3. Finally, petitioners rely heavily on legislative history in general, and a drafting change to Section 1005 in particular. As originally drafted, the bill that became Section 1005 stated that the "amendment made" to the habeas statute "shall apply to any application or other action that is pending on or after the date of the enactment of this Act." See 151 Cong. Rec. S12652, S12655 (Nov. 10, 2005). Petitioners contend that Congress, in replacing that provision with one stating that the

habeas amendment "shall take effect on the date of * * * enactment" (§ 1005(h)(1)) must have intended to preserve habeas jurisdiction in pending cases.

Petitioners' argument is untenable. To begin with, it is flatly inconsistent with Congress's continuing resolve – throughout the drafting process – to make the Act's exclusive-review provisions expressly applicable to pending cases. See § 1005(h)(2); 151 Cong. Rec. at S12655. It is also inconsistent with the views of Senators Graham and Kyl, the original co-sponsors of Section 1005, who have repeatedly and emphatically indicated that it applies to pending cases. See, e.g., 152 Cong. Rec. S970, S970-973 (Feb. 9, 2006) (Sen. Kyl); 151 Cong. Rec. S14256, S14260-14268 (Dec. 21, 2005) (Sens. Graham & Kyl); 151 Cong. Rec. S12752, S12754-12755 (Nov. 14, 2005) (Sen. Graham). The views of those Senators, as the original and principal sponsors of Section 1005, are particularly significant. See North Haven Bd. Of Educ. v. Bell, 456 U.S. 512, 526-27 (1982); FEA v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976). Petitioners' account is likewise inconsistent with the views of the President who signed the Act into law. See Signing Statement, 2005 WL 3562509, at *2 (Dec. 30, 2005). And it is even inconsistent with the views originally expressed by Senator Levin, the Minority co-sponsor of Section 1005, at a critical moment in the drafting history. On November 14, 2005, when the amendments to what became Section 1005 were presented to the Senate, and when Senator Levin

joined Senator Graham and Senator Kyl to give the bill bi-partisan sponsorship, Senator Levin articulated precisely the position that we urge here: "what our amendment does, as soon as it is enacted and the enactment is effective, it provides that the standards we set forth in our amendment will be the substantive standards which we would expect would be applied in all cases, including cases which are pending as of the effective date of this amendment." 151 Cong. Rec. at S12755.

Under these circumstances, the drafting amendment cannot possibly have effected the dramatic consequences attributed to it by petitioners. For one thing, had the amendment eliminated any congressional response to the ongoing litigation crisis at Guantanamo Bay, its continuing support by the 49 Senators who had just voted to eliminate habeas jurisdiction in pending cases, see 151 Cong. Rec. at S12655 (Nov. 10, 2005), would be inexplicable. As the Supreme Court has explained in other contexts, "'common sense suggests, by analogy to Sir Arthur Conan Doyle's "dog that didn't bark," that an amendment having the effect petitioner ascribes to it would have been differently described by the sponsor, and not nearly as readily accepted by the floor manager of the bill.'" Koon's Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 63 (2004) (quoting Church of Scientology of Cal. v. IRS, 484 U.S. 9, 17-18 (1987)). On the other hand, the substantial increase in support for the bill as amended can be explained by another change effected by the amendments: the inclusion, for

the first time, of provisions permitting judicial review of any final convictions rendered by military commissions. Compare § 1005(e)(3) with 151 Cong. Rec. at S12655. Moreover, as the legislative history indicates, the specific amendment highlighted by petitioners was intended only to improve overall statutory clarity and to foreclose arguable internal inconsistency. See, e.g., 151 Cong. Rec. at S14263 (Sen. Graham); 152 Cong. Rec. S970, S973 (Feb. 9, 2006) (Sen. Kyl). In amendments to bills or statutes, Congress often intends such modest objectives as these. See, e.g., Hammontree v. NLRB, 925 F.2d 1486, 1492 (D.C. Cir. 1991) ("An equally plausible reading of Congress's deletion of the proposed language, however, is that Congress deemed it superfluous"); Nichols v. Board of Trustees of Asbestos Local 24 Pension Plan, 835 F.2d 881, 896 n.105 (D.C. Cir. 1987) (amendment "might as easily have stemmed from a congressional intent to eliminate a redundant * * * requirement").

Petitioners also overstate the significance of the specific statements in the legislative history assertedly cutting in their favor. Many of those statements (from Senators Leahy, Kennedy, and Durbin, among others) were from Senators who voted against the bill. Of course, courts do "not usually accord much weight to the statements of a bill's opponents." Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19, 29 (1988). Petitioners also cite many statements by Senator Levin, who reversed

his initial position on the applicability of the Act to pending cases. Compare 151 Cong. Rec. at S12755 ("the standards we set forth in our amendment will be the substantive standards which we would expect would be applied in * * * cases which are pending as of the effective date of this amendment") with 151 Cong. Rec. S14256, S14257 (Dec. 21, 2005) (Act does not "apply to or alter any habeas case pending in the courts at the time of enactment"). These statements simply establish inconsistency in the views of one Senator, which cannot possibly overcome the text of the Act, the governing interpretive presumptions, and the consistent views of its two principal sponsors and of the President. Like the plaintiffs in Landgraf, petitioners at most identify "frankly partisan statements" that "cannot plausibly be read as reflecting any general agreement." See 511 U.S. at 262-63. Under these circumstances, text and interpretive presumptions are dispositive in determining how the Act applies to pending cases. See id.

Finally, apart from its narrower flaws, petitioners' account wholly ignores the broader context in which the Act was enacted. As explained above, the Act was plainly a response to Rasul and the litigation onslaught that followed in the wake of that decision. Congress designed a specialized system of exclusive review under specified standards, to reflect its own balancing of the detainees' interest in obtaining some form of judicial review and the military's surpassingly important interest in

being able to successfully prosecute an ongoing war. In this context, to impute to Congress an intent to limit the specialized-review scheme only to the presently-null set of detainees who might someday be brought to Guantanamo Bay and held pursuant to future CSRT decisions, and to make the new scheme wholly inapplicable to the hundreds of pending habeas actions that gave rise to the statute in the first place, would be nonsensical. That result cannot remotely be squared with the expressed intent of Congress to have this Court's exclusive jurisdiction apply to all pending cases, and to effect an immediate repeal of habeas jurisdiction without reservation for pending cases.

II. THE ACT DOES NOT VIOLATE THE SUSPENSION CLAUSE

Petitioners' Suspension Clause challenge to the Act is meritless, both because petitioners have no constitutional rights and because the Act would readily satisfy any possible constitutional entitlement to habeas.

A. As aliens outside the sovereign territory of the United States, petitioners have no constitutional rights under the Suspension Clause. In our merits briefs, we showed that the Fifth Amendment is inapplicable to aliens outside the sovereign territory of the United States. The same is true for other constitutional provisions, as many courts have recognized. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (Fourth Amendment inapplicable to searches of alien property abroad);

Cuban Am. Bar Ass'n. v. Christopher, 43 F.3d 1412, 1428 (11th Cir. 1995) (First Amendment inapplicable to aliens at Guantanamo Bay); 32 County Sovereignty Comm. v. Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'") (emphasis added) (quoting People's Mojahedin Org. of Iran v. Department of State, 182 F.3d 17, 22 (D.C. Cir. 1999)).

In Johnson v. Eisentrager, 339 U.S. 763 (1950), the Supreme Court held the Suspension Clause does not give aliens outside the United States a constitutional right to habeas corpus, at least during times of armed conflict. The Court explained emphatically that such a constitutional entitlement

> would hamper the war effort and bring aid and comfort to the enemy. [Habeas proceedings] would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.

Id. at 779. The Court further held that the Fifth Amendment is inapplicable to aliens abroad and, in reasoning fully applicable to the Suspension Clause, explained that "extraterritorial application of organic law" to aliens would be inconceivable. See id. at 784-85 ("No decision of this Court supports such a view. None of the learned

commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it." (citation omitted)).

Rasul does not change this constitutional holding. That decision extended the federal habeas statute to the Guantanamo detainees. The Court based its analysis on the phrase "within their respective jurisdiction" as used in 28 U.S.C. § 2241 and various decisions construing that provision. See 542 U.S. at 476-79. Moreover, the Court expressly distinguished between the statutory and Suspension Clause holdings of Eisentrager, and limited its analysis to the former. See id. at 475-76.

B. The Supreme Court has never decided whether the meaning of the Suspension Clause was fixed in 1789, or whether the Clause might evolve consistent with the expansion of statutory habeas over the course of American history. See INS v. St. Cyr, 533 U.S. 289, 304-05 (2001) (reserving the question). In our judgment, the better view is that the meaning of the Clause was fixed in 1789, because it is "too absurd to be contemplated" that the Clause would operate as a "one-way rachet that enshrines in the Constitution every grant of habeas jurisdiction" conferred by statute or judge-made common law, see id. at 341-42 (Scalia, J., dissenting), and because there are no apparent judicially manageable standards for determining how much the Suspension Clause might evolve between the historical standard of 1789 and contemporaneous statutory standards. There is significant, albeit not controlling,

support for the historical view. See ibid.; Swain v. Pressley, 430 U.S. 372, 384-85 (1977) (Burger, C.J., concurring in part and concurring in the judgment); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 47 U. Chi. L. Rev. 142, 170 (1970).

In any event, petitioners cannot succeed under any plausible temporal baseline for Suspension Clause analysis. On this point, Rasul is fatal to them. In Rasul, the Justices agreed that the habeas statute, as construed in Eisentrager, would not have extended to aliens outside the sovereign territory of the United States. According to the Rasul majority, the "statutory predicate" of Eisentrager was not overruled until 1973, when Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, assertedly overruled Ahrens v. Clark, 335 U.S. 188 (1948). See Rasul 542 U.S. 476-79. According to the Rasul dissent, the statutory holding of Eisentrager was not overruled until Rasul itself. See id. at 490-94 (Scalia, J., dissenting). Thus, petitioners would have this Court construe the Suspension Clause so as to render the statutory holdings of Ahrens and Eisentrager unconstitutional, and so as to constitutionalize a view of habeas that, even as a statutory matter, was not even arguable until 1973, and was not apparent until 2004. No precedent whatever suggests those breathtaking results. Because petitioners are aliens outside the

sovereign territory of the United States, they have no constitutional rights under the Suspension Clause.

C. Even if petitioners did have constitutional habeas rights under the Suspension Clause, the Detainee Treatment Act would be consistent with those rights. In Felker v. Turpin, 518 U.S. 651 (1996), the Supreme Court held that the significant habeas restrictions imposed by AEDPA do not effect an unconstitutional suspension. The Court stressed that "'the power to award the writ by any of the Courts of the United States, must be given by written law,'" id. at 664 (quoting Ex Parte Bollman, 8 U.S. (4 Cranch.) 75, 94 (1807)), and that "judgments about the proper scope of the writ are 'normally for Congress to make,'" ibid. (quoting Lonchar v. Thomas, 517 U.S. 314, 323 (1996)). The Court concluded that AEDPA, which severely restricts the availability of successive petitions, fell "well within the compass of [the] evolutionary process" of permissible habeas adjustments. Ibid. Any other conclusion would inappropriately convert the Suspension Clause into a "one-way rachet" for petitioners. See St. Cyr, 533 U.S. at 341 (Scalia, J., dissenting); id. at 326 (O'Connor, J., dissenting).[2] Consistent with these principles, the Supreme Court has held that Congress may freely repeal habeas jurisdiction, at least if it affords an adequate and

[2] As noted above, the St. Cyr majority did not address this point, but resolved the case on other grounds. See 533 U.S. at 304-05.

effective substitute remedy. See Swain v. Pressley, 430 U.S. 372, 381 (1977). And petitioners all but concede that the judicial review provided under Section 1005(e)(2) would itself be constitutionally sufficient if CSRT procedures gave them an adequate opportunity to contest their designation as enemy combatants. Al Odah Supp. Br. at 14.

Under these standards, Section 1005(e)(2) is more than constitutionally sufficient. As explained in our merits briefs, the CSRT procedures more than satisfy any applicable Due Process requirements for holding aliens abroad as enemy combatants during wartime. For the same reason, they would more than satisfy any procedural requirements implicitly incorporated into the Suspension Clause. In Swain, for example, the Court held that, because there is no Article III or Due Process right to a life-tenured judge in a criminal trial, the failure to provide one likewise does not violate the Suspension Clause. See 430 U.S. at 382-83. In any event, to the extent that petitioners have concerns about the legal adequacy of the CSRT standards and procedures, they may squarely raise those claims under the Act, which permits review of "whether the use of such standards and procedures to make the [enemy combatant] determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C)(ii). Indeed, petitioners also may seek review of whether a CSRT determination was consistent with tribunal standards and procedures,

§ 1005(e)(2)(C)(i) – a category of claims that prior habeas law would have denied them even in the context of capital convictions. See Yamashita v. Styer, 327 U.S. 1, 23 (1946) ("the [military] commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities").

Petitioners further err in contending that the Act is an unconstitutionally inadequate substitute for habeas review because it denies them the right to de novo judicial factfinding. Even in much less sensitive contexts than here, habeas courts do not find facts, but rather engage in highly deferential sufficiency review. See Jackson v. Virginia, 443 U.S. 307, 320-24 (1979). At common law, habeas courts did not even do that, given the longstanding rule that the truth of the custodian's return could not be controverted. See, e.g., Opinion on the Writ of Habeas Corpus, Wilm 77, 107, 97 Eng. Rep. 29, 43 (H.L.1758); Note, Developments in the Law – Federal Habeas Corpus, 83 Harv. L.Rev. 1038, 1113-1114 (1970) ("From 1789 to 1867, the period during which, with minor exceptions, federal habeas corpus extended only to federal prisoners, the federal habeas court did not hold fact hearings. The facts asserted in the return to the writ had to be accepted despite the prisoner's attempt to controvert them."); Oaks, Legal History in the High Court--Habeas Corpus, 64 Mich. L. Rev. 451, 453 (1966). And in the specific context of habeas review of military tribunals

during armed conflict, that traditional rule still applies with full vigor. See Yamashita, 327 U.S. at 8 ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts."); Ex parte Quirin, 317 U.S. 1, 25 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners.").

The only possible basis on which petitioners could distinguish these cases is to contend that the CSRTs themselves are not authorized to make enemy combatant determinations in the first instance. That claim is foreclosed by Hamdi v. Rumsfeld, 542 U.S. 507 (2004), in which the controlling opinion made clear that, consistent with longstanding practice under the Geneva Convention, the governing procedural requirements for enemy combatant determinations – even as to citizens in this country – "could be met by an appropriately authorized and properly constituted military tribunal." Id. at 538 (plurality opinion). Today petitioners' claim is even less substantial, because the Detainee Treatment Act specifically ratifies the use of these very CSRTs, subject to review of individual decisions in this Court under deferential standards. For authorization purposes, CSRTs are now as fully legitimate as the military commissions appropriately given broad latitude in Quirin, Yamashita, and Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), cert. pending (No. 05-184).

Factual inquiry is also not permitted in other habeas contexts. For example, in the immigration context, the Court has long upheld habeas review restricted to claims of legal error. See Gegiow v. Uhl, 239 U.S. 3, 9 (1915). "In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive." INS v. St. Cyr, 533 U.S. 289, 306 (2001) (citation and footnote omitted). This is why the elimination of habeas review over immigration decisions – and, as to specified criminal aliens, the grant of court-of-appeals review limited to legal claims in the Real ID Act – raises no Suspension Clause issue. See Gittens v. Menifee, 428 F.3d 382, 387 n. 5 (2d Cir. 2005).

For all of these reasons, the exclusive-review scheme afforded by the Act is more than adequate for Suspension Clause purposes.

III. THIS COURT SHOULD DETERMINE THE MERITS OF PETITIONERS' CONSTITUTIONAL AND AUMF CLAIMS, WHICH ARE WITHIN ITS EXCLUSIVE JURISDICTION

Because the Act applies to these cases, the district courts have lost any continuing jurisdiction, and this Court's jurisdiction arises, if at all, only under Section 1005(e)(2).

This Court can and should convert the pending appeals into petitions for review under Section 1005(e)(2). In an analogous circumstance, other courts of appeals

converted pending habeas appeals into petitions for review under the REAL ID Act. See, e.g., Bonhometre v. Gonzales, 414 F.3d 442, 446 (3d Cir. 2005); Gittens v. Menifee, 428 F.3d 382, 384-386 (2d Cir. 2005) (per curiam); Alvarez-Barajas v. Gonzales, 418 F.3d 1050, 1052-53 (9th Cir. 2005); Rosles v. BICE, 426 F.3d 733, 736 (5th Cir. 2005) (per curiam). Moreover, converting these habeas appeals into petitions for review under Section 1005(e)(2) would be most consistent with Congress's decision to apply that provision to covered claims "pending on" the date of its enactment. § 1005(h)(2). Consistent with that decision, Congress expressly contemplated that pending cases would be converted. See, e.g., 151 Cong. Rec. S14256, S14263 (Dec. 21, 2005) (Sen. Graham) ("regarding the modification of the jurisdiction of those courts currently hearing individual habeas or other actions that have been filed by the detainees, we wanted those cases to be recast as appeals of their CSRT determinations"); 152 Cong. Rec. S970, S973 (Feb. 9, 2006) (Sen. Kyl) ("rather than requiring that pending cases be dismissed, the new law allows courts to consider those cases as requests for review under the new standards and, where necessary, transfer them to the appropriate forum").

Section 1005(e)(2)(C) sets forth the scope of review now applicable to these cases. It permits this Court to determine:

> (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
>
> (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

§ 1005(e)(2)(C).

Section 1005(e)(2)(C)(ii) permits review of the constitutional and statutory issues raised in these appeals: whether the Due Process Clause of the Fifth Amendment applies to the Guantanamo Detainees; if so, whether the CSRT procedures satisfy due process; and whether the President was authorized to detain petitioners as enemy combatants pursuant to Article II of the Constitution and the AUMF. See Al Odah Br. at 22-60; Boumediene Br. at 14-27, 43-54. These issues have been exhaustively briefed and argued to this Court. All parties involved would benefit from their prompt resolution by this Court.

We do not believe that Section 1005(e)(2)(C)(ii) permits review for treaty claims. That provision limits review to the question whether the standards and procedures used by the CSRTs are "consistent with the Constitution and laws of the United States," to the extent the "Constitution and laws of the United States" are

applicable. In contrast, the habeas statute permits review of claims that a petitioner is being held "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Accordingly, this Court should dismiss petitioners' various treaty-based claims.[3]

The Government recognizes that the detainees as yet have had no fair opportunity to raise claims within the scope of Section 1005(e)(2)(C)(i). After this Court resolves the legal issues discussed above, we would not object if it were to afford petitioners an opportunity to raise any additional claims they may have under that provision.

Finally, because the Act eliminates any further basis for the exercise of district court jurisdiction, this Court should vacate the district court judgments and order dismissal of the petitioners' habeas cases in the district court for lack of jurisdiction. See United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950) ("The established

[3] This Court need not reach the question whether the Act permits review of treaty claims. We recognize that Steel Co., 523 U.S. at 94-101, requires the courts to decide jurisdictional questions before they decide merits ones. Although cast in jurisdictional terms, it is unclear whether the "scope of review" provisions in the Act bear on subject-matter jurisdiction for Steel Co. purposes. In any event, a threshold ruling that the treaties are not judicially enforceable would be permissible, both because judicial enforceability is itself not a merits determination, see Steel Co., 523 U.S. at 100-01 n.3, and because, given this Court's binding decision in Hamdan, the treaty claims are now (as a matter of circuit precedent) wholly insubstantial, see CRLP v. Bush, 304 F.3d 183, 193-94 (2d Cir. 2002).

practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."); Ramallo v. Reno, 114 F.3d 1210, 1213-14 (D.C. Cir. 1997) (analogizing to Munsingwear and holding that vacatur of the district court judgment was proper where statute depriving district court of jurisdiction was enacted only after the district court's entry of judgment).

CONCLUSION

For the foregoing reasons, this Court should convert the pending appeals into petitions for review under Section 1005(e)(2), proceed to decide the pending legal questions to the extent permitted by Section 1005(e)(2)(C)(ii), and order dismissal of the pending district court cases for want of jurisdiction.

Respectfully submitted,

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FEBRUARY 2006

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 12,893 words (which does not exceed the applicable 14,000 word limit).

_____
Catherine Y. Hancock

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2006, I filed and served the foregoing Supplemental Brief of the Federal Parties Addressing the Detainee Treatment Act of 2005 by causing an original and fourteen copies to be delivered to the Court via hand delivery, and by causing two paper copies to be delivered to lead counsel of record via Federal Express (or hand delivery) and e-mail transmission:

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EXHIBIT 2

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Subject: GTMO--Detainee's Name & ISN

Dear Counsel:

After further consultation on the subject, the Department of Defense has determined for the purposes of this habeas litigation only that the pairing of a detainee's name and the 3, 4, or 5-digit ISN for the detainee is no longer classified or subject to treatment as protected information under the applicable protective orders. To be clear, however, this determination does not affect, and should not be construed as affecting, the classification or protected status of the name and/or ISN where that information is used in an otherwise classified or protected context; if a detainee's name and/or ISN appears in a context that is otherwise classified or protected, then the name and/or ISN should be treated as classified or protected pursuant to the applicable protective order. For example, if a classified or protected source is identified by name and/or ISN, or if a classified or protected fact includes a detainee's name and/or ISN, the information remains classified or protected and should be treated as classified or protected pursuant to the applicable protective order.

Please contact me if you have any questions.

Regards,

Andrew I. Warden
Trial Attorney
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Tel: 202.616.5084
Fax: 202.616.8460

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDULLA THANI FARIS AL-ANAZI, *et al.*,	
Petitioners,	
v.	**Civ. No. 1:05-CV-00345 (JDB)(AK)**
GEORGE W. BUSH, *et al.*,	
Respondents	

FAWZI AL ODAH, *et al.*,	
Petitioners,	
v.	**Civ. No. 1:02-CV-0828 (CKK)(AK)**
GEORGE W. BUSH, *et al.*,	
Respondents	

SUHAIL ABDU ANAM, *et al.*,	
Petitioners,	
v.	**Civ. No. 1:04-CV-1194 (HHK)(AK)**
GEORGE W. BUSH, *et al.*,	
Respondents	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOUD ABDAH, *et al.*, **Petitioners,** **v.** **GEORGE W. BUSH, *et al.*,** **Respondents**	**04-CV-1254 (HHK) (AK)**
ABDULSALAM ALI ABDULRAHMAN AL-HELA, *et al.*, **Petitioners,** **v.** **GEORGE W. BUSH, *et al.*,** **Respondents**	**05-CV-1048 (RMU) (AK)**
SAEED MOHAMMED SALEH HATIM, *et al.*, **Petitioners,** **v.** **GEORGE W. BUSH, *et al.*,** **Respondents**	**05-CV-1429 (RMU) (AK)**

ABDUL HADI OMER HAMOUD FARAJ,	
Petitioners,	
v.	**Civ. No. 1:05CV01490 (PLF)(AK)**
GEORGE W. BUSH, *et al.,*	
Respondents	

MAHMOOD SALIM AL-MOHAMMED, *et al.*,	
Petitioners,	
v.	**Civ. No. 1:05CV00247 (HHK)(AK)**
GEORGE W. BUSH, *et al.,*	
Respondents	

MOHAMMED, *et al.*,	
Petitioners,	
v.	**Civ. No. 1:05CV02087 (RMC)(AK)**
GEORGE W. BUSH, *et al.,*	
Respondents	

NABIL, *et al.*,	)	
	)	
Petitioners,	)	
	)	
	)	
v.	)	**Civ. No. 1:05CV01504 (RMC)(AK)**
	)	
	)	
GEORGE W. BUSH, *et al.*,	)	
	)	
Respondents	)	
	)	

AL HAWARY, *et al.*,	)	
	)	
Petitioners,	)	
	)	
	)	
v.	)	**Civ. No. 1:05CV01505 (RMC)(AK)**
	)	
	)	
GEORGE W. BUSH, *et al.*,	)	
	)	
Respondents	)	
	)	

SAIB, *et al.*,	)	
	)	
Petitioners,	)	
	)	
	)	
v.	)	**Civ. No. 1:05CV01353 (RMC)(AK)**
	)	
	)	
GEORGE W. BUSH, *et al.*,	)	
	)	
Respondents	)	
	)	

SHAFIQ, *et al.*,	)	
	)	
Petitioners,	)	
	)	
	)	
v.	)	**Civ. No. 1:05CV01506 (RMC)(AK)**
	)	
	)	
GEORGE W. BUSH, *et al.*,	)	
	)	
Respondents	)	
	)	
HASSAN BIN ATTASH, *et al.*,	)	
	)	
Petitioners,	)	
	)	
	)	
v.	)	**Civ. No. 1:05CV01592 (RCL)(AK)**
	)	
	)	
GEORGE W. BUSH, *et al.*,	)	
	)	
Respondents	)	
	)	
ABDANNOUR SAMEUR, *et al.*,	)	
	)	
Petitioners,	)	
	)	
	)	
v.	)	**Civ. No. 1:05CV01806 (CKK)(AK)**
	)	
	)	
GEORGE W. BUSH, *et al.*,	)	
	)	
Respondents	)	
	)	

PETITIONERS' MOTION TO COMPEL PRIVILEGE TEAM COMPLIANCE WITH THE AMENDED PROTECTIVE ORDER

Petitioners ask this Court to compel the Privilege Team to comply with the Amended Protective Order and related orders entered in the above-captioned Guantánamo detainee cases. *See* Ex. A (Amended Protective Order, 344 F. Supp. 2d 174 (D.D.C. Nov. 8, 2004)); Ex. B (supplemental filing procedures); Ex. C (designation procedures for "protected information") (collectively, the "Protective Order"). Acting beyond its authority and in violation of the Protective Order, the Privilege Team has interfered with habeas counsel's representation of their clients and has undermined counsel's effectiveness. The Privilege Team, whose only function is to determine the classification status of documents submitted to it by habeas counsel, has (1) refused to perform classification review of documents submitted by counsel, and (2) improperly instructed counsel that certain unclassified documents must be treated as "protected information" and not made public. Because habeas counsel face unique limitations on access to their clients, the effect of the Privilege Team's *ultra vires* actions has been to deny Petitioners the effective assistance of counsel to which they are entitled. *See Al Odah v. United States*, 346 F. Supp. 2d 1, _ (D.D.C. 2004).

I. BACKGROUND

After the Supreme Court held in *Rasul v. Bush*, 542 U.S. 466 (2004), that the Guantánamo detainees may pursue their habeas claims in federal court, counsel sought access to their clients in order to assist them in pursuing these claims. In the *Al Odah* case, Judge Colleen Kollar-Kotelly held that counsel must be allowed access to their clients without the conditions the government wished to impose on counsel visits to the

base, including audio and video real time monitoring and an immediate post-hoc "classification review" of any notes taken by counsel and any legal mail to or from counsel, stating that these conditions would "impermissibly burden the attorney-client relationship and abrogate the attendant attorney-client privilege." *Al Odah*, 346 F. Supp. 2d at 15.

The pending Guantánamo habeas matters were subsequently coordinated before Judge Joyce Hens Green, and the issue of how to allow counsel access to their clients while still protecting classified information from disclosure was raised again. Judge Green instructed the parties to work out mutually agreeable procedures to allow counsel access to their clients in a manner that would respect the attorney-client relationship and address the Government's national security concern that communications between client and counsel not be used as a mechanism to pass classified information to or from the detainees. After an extensive negotiation lasting weeks, habeas counsel and Respondents were able to agree upon a number of procedures, but left certain key issues to be resolved by Judge Green. Among the items still to be resolved was the manner in which counsel's interview notes and their clients' privileged correspondence would be handled.

Judge Green's Protective Order sets forth a detailed scheme for determining whether information given to counsel is classified and protecting that information accordingly. Counsel's interview notes and letters from their clients must be transported by the military directly from Guantánamo to a Secure Facility in Crystal City, Virginia. They may not be reviewed by counsel outside of the Secure Facility or made public until they have been reviewed by a "Privilege Team," composed of Department of Defense personnel who have not and will not participate in any proceeding involving the detainees, whose job is to determine whether detainee communications, including those made in

person to counsel and those made through privileged legal correspondence, are classified. Ex. A, Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Gunantanamo Bay, Cuba ("Revised Procedures for Counsel Access") (attached to Amended Protective Order as Exhibit A), Part VII.

The Privilege Team's duties are well-defined and clearly circumscribed. It is required to determine whether any documents habeas counsel chooses to submit contain classified information. *Id.* VII.A ("Counsel may submit information learned from a detainee to the privilege team for a determination of its appropriate security classification ... No information derived from these submissions shall be disclosed outside the privilege team pursuant to these procedures until after the privilege team has reviewed it for security and intelligence purposes"); VII.C ("As soon as possible after conducting the classification review, the privilege team shall advise counsel of the classification levels of the information contained in the materials submitted for review"). After review, the Privilege Team must "forward its classification determination directly to counsel after a review and analysis period not to exceed" seven business days for notes or letters written in English, fourteen business days for documents drafted in a foreign language, and twenty business days where the Privilege Team has reason to believe that code is being used. *Id.* at VII.C. Nothing in the Protective Order empowers the Privilege Team to refuse to review any document that habeas counsel submits.[1]

[1] The Privilege Team also has a limited role in inspecting packages and letters sent from habeas counsel to their clients to assure that no physical contraband is included in the package. Ex. A, Revised Procedures for Counsel Access, IV.A.7.

Despite these mandates, the Privilege Team has refused outright to review information learned from the detainees and submitted for review by counsel. Furthermore, rather than determining whether all information submitted by counsel is or is not classified, the Privilege Team has instead marked certain documents as "For Official Use Only" and then asserted that this material should be treated as "protected," leaving counsel without a determination of whether or not the material in question is classified. These violations undermine the goals of the Protective Order: to facilitate attorney-client access and to determine whether information is classified and ensure that it is treated accordingly.

In addition to undermining the goal of the Protective Order, the failure of the Privilege Team to abide by that order makes it impossible for counsel to represent their clients effectively. The terms of the Protective Order already impose a heavy burden on habeas counsel, making immediate access to client correspondence and interview notes impossible. For example, correspondence from clients is sent from Guantánamo to a Secure Facility operated by Respondents in Crystal City, Virigina, where it is deposited with the Court Security Officer.[2] After correspondence arrives, a process that generally takes weeks, habeas counsel may arrange for a security-cleared translator to go to the secure facility to translate the letters, which are then submitted to Privilege Team. The entire process, from the client handing the letter to a guard at Guantánamo until the letter is

[2] The process does not always go well. On September 16, 2005, the Court Security Officer informed counsel that legal mail from their clients had been misaddressed to the Department of Homeland Security and then misdirected to a basement in the Department of Justice, where it had sat unnoticed for more than three months. Falkoff Declaration, attached as Exhibit D, at ¶ 14.

in possession of counsel following privilege review, frequently takes as long as two months.

Similarly, it often takes more than a month for client interview notes to be cleared. After interviewing a client at Guantanamo, habeas counsel are required to hand over all attorney interview notes to military personnel. The notes are then to be shipped from Guantánamo to the Secure Facility, a process that often takes more than three weeks.[3] Sometimes the process breaks down entirely.[4] It is only after attorney interview notes arrive at the Secure Facility that habeas counsel can submit the notes to the Privilege Team for classification review.

The Privilege Team's violations of the Protective Order – their refusal to review documents and their designation of certain documents as "protected" – makes counsel's representation of Petitioners exponentially more difficult. Each time the Privilege Team refuses to review a document, counsel must visit the Secure Facility in Washington to resubmit the document with an explanation for why review is required. Continued recalcitrance by the Privilege Team has left a number of document unreviewed to the present day, including a chart of detainees' medical ailments which was submitted to counsel in

[3] After complaints from counsel, the Department of Defense set up a secured fax line to allow transmission of interview notes from Guantánamo directly to the Secure Facility. In order to fax notes, however, counsel must devote at least half a day of a visit to the process, and even then is unlikely to succeed in transmitting the notes since the fax link is temperamental, the process itself is astoundingly slow (about 4 minutes per page). Moreover, the fax line has been entirely inoperational for at least two months. *See* Falkoff Declaration at ¶ 6.

[4] For example, in December, 2005, Respondents acknowledged to counsel that the military had lost the privileged and presumptively-classified client interview notes that counsel had prepared at Guantánamo and handed to the military for delivery to the Secure Facility. *See* Colangelo-Bryan Declaration, attached as Exhibit E, at ¶ 5.

an effort to address serious deficiencies in the medical care being provided at Guantánamo. *See* Falkoff Declaration at ¶ 10. In addition, habeas counsel has been working under the shadow of an implied threat of a contempt charge as a result of the Privilege Team's *ultra vires* declaration that documents it has deemed "For Official Use Only" must be treated as "protected" information that cannot be discussed in public.

II. LEGAL AUTHORITY

By order of the Calendar and Case Management Committee, "all Motions pertaining to interpretation or construction of any protective order which has been entered in [these] cases shall be referred to Magistrate Judge Alan Kay pursuant to LCvR 72.2(a)." November 2, 2005 Order at 1.

III. ARGUMENT

The Privilege Team has repeatedly violated the terms of the Protective Order and has acted well beyond its authority by refusing to perform classification review of documents submitted to it by habeas counsel and by presuming to instruct counsel that certain unclassified documents must be treated as "protected information" and not made public.

A. The Privilege Team's Refusal to Review Documents Submitted by Petitioners Violates Its Obligations Under the Protective Order.

The role of the Privilege Team as set forth in the Protective Order is simple and well-defined. It is primarily to determine the classification level of any document that habeas counsel submits for classification review so that counsel will know whether or not the information contained in the document must be treated in a classified manner.[5] Nei-

[5] Pursuant to the Protective Order, "classified information" or "classified documents" refer to "[a] any classified document or information that has been classified by an Executive Branch agency in the interests of national security or pursuant to Executive Order. .

ther the content of the documents the Privilege Team is asked to review nor the purpose for which the document will ultimately be used is of any relevance for the Privilege Team's duties under the Protective Order. The members of the Privilege Team need not be lawyers and, to counsel's knowledge, no member of the Privilege Team is a lawyer. Privilege Team members are not empowered to police the terms of the Protective Order and they may not decide for themselves whether a document should or should not have been submitted for review in the first place. On the contrary, two judges of this Court have previously noted that this duty lies in the province of security-cleared habeas counsel.

Judge Kollar-Kotelly, for instance, noted during a status conference in the *Al Odah* matter that "security clearance means that the attorney is trustworthy to both hear the information at whatever the level is [and] not disclose it, if it's inappropriate," that counsel is trained to handle classified information and that they are "expected to follow the rules on the use and disclosure of classified material." Tr. of Status Conference, *Al Odah v. United States*, Aug. 16, 2004 (CKK) at 16–17 (attached as Exhibit F). Judge Kollar-Kotelly, emphasizing that habeas counsel could be entrusted with this responsibility, noted that there are "sanctions relating to the misuse or disclosure of information.

.as 'CONFIDENTIAL,' 'SECRET,' or 'TOP SECRET,' or additionally, controlled as 'SENSITIVE COMPARTMENTALIZED INFORMATION (SCI),' or any classified information in such document; [b] any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party that has been derived from United States government information that was classified. . . .[c] verbal or non-documentary classified information known to the petitioner or petitioner's counsel; or [d] any document and information as to which the petitioner or petitioner's counsel have been notified orally or in writing that such documents [*sic*] or information contains classified information." Ex. A, ¶9. As discussed below, the designation "For Official Use Only" is not a classification level.

Frankly, it probably would be fairly easy to track back, because all of the information is going to be fairly specific to each of the detainees in terms of what information they're likely to disclose. I mean, there are criminal offenses that are in the statutes that go up to the death penalty." *Id.*; *see also* Letter from Chief Judge Thomas F. Hogan to Clive A. Stafford Smith, Aug. 19. 2005 (Protective Order requires Privilege Team to inspect mail packages for physical contraband, but "places on counsel of record the responsibility for determining that materials being forwarded to the attorney's client(s) comply with the Protective Order provision" that legal mail shall not include information relating to, among other things, military operations) (attached as Exhibit G).

The Privilege Team has violated the terms of the Protective Order and overstepped the bounds of its authority repeatedly by refusing to review certain documents provided to it by counsel. Among the documents that were refused review are the following:

- A client letter sent to counsel because it requested that counsel, "tell the world" about the torture the client had suffered. Falkoff Declaration at ¶ 12.

- A chart of medical ailments suffered by dozens of Guantánamo detainees because counsel's notes indicate the chart was prepared in part by another detainee. Falkoff Declaration at ¶ 10.

- Portions of attorney interview notes from September 2005, concerning abuse that the detainees' had suffered and the reasons for one detainee's participation in the ongoing hunger strike. No explanation was provided by the Privilege Team. Huskey Declaration, attached as Exhibit H, at ¶ 7.

- Medical charts detailing the detainees' weight loss resulting from the hunger strike, which were given to counsel by a client after he received them for his own personal use from the detainee hospital staff. Although these charts were submitted to the Privilege Team as materials received from the detainees, the Privilege Team refused to review

them or determine their classification status, falsely alleging that they had been "taken without permission" and were "not obtained through authorized means." Huskey Declaration at ¶ 4-5.

- A "Last Will and Testament" written by a severely ill detainee, who read the document aloud to counsel, had counsel witness the document, and then entrusted the document to counsel in her capacity as his lawyer. The document contained sentiments describing the detainee's state of mind, his wishes for his family in the event of his death, and other standard elements of a will and testament. The Privilege Team refused to review or classify the document, with the explanation that they were not able to make a classification determination because "the document appeared to contain messages to parties other than counsel" and that if counsel "wishes the information to be released to his family" – a sentiment that was certainly never relayed to the Privilege Team as counsel simply wanted to submit the will for a classification determination – then it should be sent via normal mail channels. Huskey Declaration at ¶ 8-10.

The common denominator in these refusals is the Privilege Team's determination that habeas counsel should not have submitted the document for classification review in the first place. Presumably, the Privilege Team's position is that these documents are "non-legal correspondence or messages from a detainee to individuals other than his counsel." Ex. A, Revised Procedures for Counsel Access, IV.B.5. This construction is untenable, of course, as the Privilege Team's classification of a last will and testament as a "message to family" should make clear.

At any rate, the terms of the Protective Order do not give the Privilege Team discretion not to review documents submitted for classification review. The Protective Order is clear that habeas counsel is authorized to "submit information learned from a detainee to the privilege team for a determination of its appropriate security classification." Ex. A, Revised Procedures for Counsel Access, VII.A. It contains no provision authorizing the Privilege Team to decide *whether* to review the documents counsel has chosen to

submit. On the contrary, the Protective Order provides that "[a]s soon as possible after conducting the classification review, the privilege team *shall* advise counsel of the classification levels of the information contained in the materials submitted for review." *Id.* at VII.C.

Judge Green vested habeas counsel, not the Privilege Team, with the responsibility for determining whether a detainee was seeking to use them as a conduit for a letter or message to a family or friend. This is at it should be. Counsel who have met with their clients were granted security clearance by the FBI, are intimately familiar with the provisions of the Protective Order, and labor under the knowledge that their failure to abide by the Protective Order's strictures may lead to contempt citations or criminal prosecution. Habeas counsel are, moreover, trained legal professionals who understand the nature of privileged communications and how to construe legal documents such as the Protective Order. A number – including some of the undersigned – were deeply involved in the negotiation of the Protective Order itself. In contrast, the Privilege Team possess a single area of competence and expertise: determining whether a document is classified or unclassified.

If Respondents believe that counsel has failed to abide by the terms of the Protective Order, they may seek relief from the Court. Habeas counsel is fully aware that Respondents or the Court may initiate a contempt action or advocate for criminal prosecution. The members of the Privilege Team, however, cannot reasonably be the arbiters of whether habeas counsel has complied with the Protective Order. Their sole function is to

determine whether the document that has been given to them for review is classified or unclassified.[6]

B. The Privilege Team is Improperly Characterizing Documents as "Protected Information."

After the entry of the Protective Order, Respondents sought to designate as "protected" certain information that they had provided to habeas counsel. Under the Protective Order, the terms "protected information" or "protected documents" refer to "any document or information deemed by the Court, either upon application by Counsel or *sua sponte*, as worthy of special treatment as if the document or information were classified, even if the document or information has not been formally deemed to be classified." Because the procedure for designating information as "protected" was somewhat elliptical in the Protective Order, Judge Green issued a supplementary order addressing designation procedures for "protected information." *See* Ex. C. In a nutshell, Respondents must disclose the information to Petitioners' counsel, attempt to reach an agreement regarding the designation of the information and then file a motion with the Court seeking to designate the information as "protected." Once this process is begun, Petitioners' counsel is to treat the information as "protected" unless and until the Court rules that the information is not protected.

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[6] Counsel understand that, at Respondents' suggestion, the Court has appointed a "Special Litigation Team" to assist the Privilege Team in a similar challenge to its *ultra vires* acts in the *Salahi* case. *See* Feb. 2, 2006 Order of Magistrate Judge Kay in *Salahi v. Bush,* 05-CV-0569 (JR)(AK). While we believe that the Privilege Team's limited duties are clear from the face of the Protective Order and that it is unnecessary to allow yet more government lawyers access to the privileged communications of our clients, we have no objection to the Court's appointment of a similar Special Litigation Team, under the same stringent restrictions, for the sole and limited purpose of advising the Privilege Team in its response to the instant motion.

Notwithstanding this clear designation of authority among the parties and the Court, the Privilege Team has presumed to order habeas counsel to treat numerous documents – those which it has classified as "For Official Use Only" or "FOUO" – as "protected documents" subject to treatment as if they were classified. Most frequently, the information that the Privilege Team classifies as "FOUO" and "protected" relates to detainees' internment numbers coupled with the detainees' names.

Once again, the Privilege Team is acting far beyond its competence or authority. First, "FOUO" is nothing but an internal Department of Defense designation whose purpose is to determine whether a particular document must be released to the public under the Freedom of Information Act. *See* DoD Regulation 5200.1: C5.2.7.1.1.3. ("The abbreviation 'FOUO' is used to designate unclassified portions that contain information that may be exempt from mandatory release to the public under [FOIA] . . ."). The designation is specifically "not authorized as an anemic form of classification to protect national security interests," *id.* 5400.7-R: C4.1.1, and, indeed, "is, by definition, unclassified," *id.* AP3.2.2.3.2. Any restrictions on releasing FOUO information to the public operate only on the Department of Defense and have no application to habeas counsel or other private citizens.

Second, the Protective Order contemplates Privilege Team review of documents only for designation as classified (i.e., "Confidential," "Secret," "Top Secret," or "Secure Compartmentalized Information") or unclassified. *See* Ex. A, ¶ 9; Ex. A, Revised Procedures for Counsel Access, VII.C. The Protective Order does not recognize the designation "FOUO" and does not authorize the Privilege Team to designate documents in that manner. While habeas counsel has no objection to the Privilege Team simply marking

documents "FOUO," the further step of presuming to restrict counsel's use of such documents by declaring them "protected" is simply unacceptable. The Protective Order spells out precisely how documents are to be designated as "protected" and the roles of the parties in that process; if Respondents wish to seek "protected" status for certain documents or information, the process for doing so is clear. *See* Ex. B. The Privilege Team is not part of that process. It is not authorized to order habeas counsel to treat information or documents as "protected" and it is not even authorized to ask the Court to designate information as "protected."

The Privilege Team has circulated a memorandum to habeas counsel explaining why it believes it has authority to designate "FOUO" information as "protected." The same memorandum directs counsel in a blanket order not make such information public. The memorandum is far too confused and confusing to merit a point-by-point response. It is attached hereto as Exhibit I, if the Court would like to review it.

Violations of the Protective Order may subject habeas counsel to contempt citation from the Court. The intentional release of classified information may subject habeas counsel to criminal prosecution. It is unacceptable for habeas counsel, proceeding *pro se* for these Petitioners, to work under the threat of criminal and contempt proceedings because of the *ultra vires* actions of the Privilege Team.[7]

[7] Counsel initially intended to raise a third issue in the instant motion, concerning the Privilege Team's repeated failure to meet deadlines for classfication review imposed by the Protective Order. For example, counsel in one of the above-captioned cases submitted Arabic language documents for classification determination on August 9, 2005 that were not reviewed until after September 20, 2005, and other documents on November 15 and 21, 2005 that the Privilege Team ultimately refused to review, but failed to even notify counsel of this refusal until January 21 and February 6, 2006 respectively. *See* Colangelo-Bryan Declaration at ¶ 6-7. Counsel in another case likewise submitted Ara-

IV. CONCLUSION

For the reasons stated above, this Court should compel the Privilege Team to abide by the Protective Order by (1) completing classification review for every document submitted by habeas counsel, without exception, including documents that the Privilege Team initially refused to review and that have been resubmitted by counsel; and (2) ceasing to declare any information or documents as "protected."

Dated: February 21, 2006
Washington, D.C.

Respectfully submitted

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bic language documents on December 21, 2005 that were not reviewed until February 2, 2006. *See* Raut Declaration, attached as Exhibit J, at ¶ 5-7. As per the Protective Order, the Privilege Team must determine the security classification of documents within seven business days of submission by counsel if the documents are in English, within fourteen business days if the documents are in a foreign language, and within twenty business days if the Privilege Team has reason to believe that code is being used. Ex. A, Ex. A., Part VI. After consulting with the Privilege Team, counsel learned that Respondents had not made an Arabic-language interpreter sufficiently available to allow the Privilege Team to perform its duties within the time limits provided by the Protective Order. Counsel has been assured that, going forward, an interpreter will without fail be available to assist the Privilege Team in its court-mandated duties. We have therefore chosen only to note this issue here in hopes that future intervention by the court will be unnecessary.

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

***In re* Guantanamo Detainee Cases**	**Civil Action Nos. 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1142 (RJL), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1166 (RJL), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK), 04-CV-1519 (JR)**

AMENDED PROTECTIVE ORDER AND PROCEDURES FOR COUNSEL ACCESS TO DETAINEES AT THE UNITED STATES NAVAL BASE IN GUANTANAMO BAY, CUBA

This matter comes before the Court upon Respondents' Motion for Protective Order to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information that may be reviewed by, made available to, or are otherwise in the possession of, the petitioners and/or petitioners' counsel in these coordinated cases. Pursuant to the general supervisory authority of the Court, in order to protect the national security, and for good cause shown,

IT IS ORDERED:

1. The Court finds that these cases involve classified national security information or documents, the storage, handling and control of which require special security precautions, and access to which requires a security clearance and a "need to know." These cases may also involve other protected information or documents, the storage, handling and control of which may require special precautions in order to protect the security of United States government personnel and facilities, and other significant government interests.

2. The purpose of this Protective Order is to establish the procedures that must be followed by all petitioners' counsel, their respective petitioner(s), all other counsel involved in

these cases, translators for the parties, and all other individuals who receive access to classified national security information or documents, or other protected information or documents, in connection with these cases, including the privilege team as defined in Exhibit A.

3. The procedures set forth in this Protective Order will apply to all aspects of these cases, and may be modified by further order of the Court *sua sponte* or upon application by any party. The Court will retain continuing jurisdiction to enforce or modify the terms of this Order.

4. Nothing in this Order is intended to or does preclude the use of classified information by the government as otherwise authorized by law outside of these actions.

5. Petitioners' counsel shall be responsible for advising their employees, the petitioners, and others of the contents of this Protective Order, as appropriate or needed.

6. Petitioners' counsel are bound by the terms and conditions set forth in the "Revised Procedures For Counsel Access To Detainees At the U.S. Naval Base In Guantanamo Bay, Cuba," and the procedures for handling mail and documents brought into and out of counsel meetings, attached hereto as Exhibit A. This Protective Order specifically incorporates by reference all terms and conditions established in the procedures contained in Exhibit A to the extent they place limitations on petitioners' counsel in their access to and interaction with petitioners or handling of information. Any violation of the terms and conditions of those procedures will also be deemed a violation of this Protective Order. This paragraph does not apply with respect to provisions in the procedures contained in Exhibit A that are or have been overridden by the Court.

7. The privilege team shall not disclose to any person any information provided by counsel for a petitioner or by a petitioner, other than information provided in a filing with the Court, unless such information, if it were monitored information, could be disclosed under Section X of Exhibit A. Such disclosure shall be consistent with the provisions of Section X of Exhibit A.

Definitions

8. As used herein, the words "documents" or "information" shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), and further include, but are not limited to:

a. papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, interoffice and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, telefacsimiles, invoices, worksheets, and drafts, alterations, modifications, changes and amendments of any kind to the foregoing;

b. graphic or oral records or representations of any kind, including, but not limited to, photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind, and motion pictures;

c. electronic, mechanical or electric records of any kind, including, but not limited to, tapes, cassettes, disks, recordings, electronic mail, films, typewriter ribbons, word processing or other computer tapes or disks, and all manner of electronic data processing storage; and

d. information acquired orally.

9. The terms "classified national security information and/or documents," "classified information" and "classified documents" refer to:

a. any classified document or information that has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE

COMPARTMENTED INFORMATION (SCI)," or any classified information contained in such document;

b. any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party that has been derived from United States government information that was classified, regardless of whether such document or information has subsequently been classified by the government pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)";

c. verbal or non-documentary classified information known to the petitioner or petitioners' counsel; or

d. any document and information as to which the petitioner or petitioners' counsel have been notified orally or in writing that such documents or information contains classified information.

10. All classified documents, and information contained therein, shall remain classified unless the documents bear a clear indication that they have been declassified by the agency or department that is the original classification authority of the document or the information contained therein (hereinafter, the "original classification authority").

11. The terms "protected information and/or documents," "protected information" and "protected documents" refer to any document or information deemed by the Court, either upon application by counsel or *sua sponte*, as worthy of special treatment as if the document or information were classified, even if the document or information has not been formally deemed to be classified.

12. For purposes of this Protective Order, "petitioners' counsel" shall be defined to include an attorney who is employed or retained by or on behalf of a petitioner for purposes of

representing the petitioner in habeas corpus or other litigation in federal court in the United States, as well as co-counsel, interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

13. "Access to classified information" or "access to protected information" shall mean having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information or protected information.

14. "Secure area" shall mean a physical facility accredited or approved for the storage, handling, and control of classified information.

15. "Unauthorized disclosure of classified information" shall mean any knowing, willful or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient.

Designation of Court Security Officer

16. The Court designates Christine E. Gunning as Court Security Officer for these cases, and Joan B. Kendrall, Michael P. Macisso, James P. Londergan, Mary M. Cradlin, Daniel O. Hartenstine, John P. Molinard, Jennifer Campbell, and Barbara J. Russell as Alternate Court Security Officers, for the purpose of providing security arrangements necessary to protect from unauthorized disclosure of any classified documents or information, or protected documents or information, to be made available in connection with these cases. Petitioners' counsel shall seek guidance from the Court Security Officer with regard to appropriate storage, handling, transmittal, and use of classified documents or information.

Access to Classified Information and Documents

17. Without authorization from the government, no petitioner or petitioners' counsel shall have access to any classified information involved in these cases unless that person shall first have:

a. made a written submission to the Court Security Officer precisely stating the reasons why counsel has a need to know the classified information requested; and

b. received the necessary security clearance as determined by the Department of Justice Security Officer; and

c. signed the Memorandum of Understanding ("MOU"), attached hereto as Exhibit B, agreeing to comply with the terms of this Protective Order.

The written submissions that are made by counsel to the Court Security Officer stating the reasons why counsel has a need to know the classified information requested shall be kept confidential by the Court Security Officer and shall not be disclosed to any other counsel or party to these cases unless the Court specifically orders such disclosure.

18. Petitioners' counsel to be provided access to classified information shall execute the MOU appended to this Protective Order, and shall file executed originals with the Court and submit copies to the Court Security Officer and counsel for the government. The execution and submission of the MOU is a condition precedent for petitioners' counsel to have access to, or continued access to, classified information for the purposes of this proceeding.

19. The substitution, departure, or removal of petitioners' counsel from these cases for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Order.

20. The government shall arrange for one appropriately approved secure area for the use of petitioners' counsel. The secure area shall contain a working area that will be supplied with secure office equipment reasonable and necessary to the preparation of the petitioners' case. Expenses for the secure area and its equipment shall be borne by the government.

21. The Court Security Officer shall establish procedures to ensure that the secure area is accessible to the petitioners' counsel during normal business hours and at other times on reasonable request as approved by the Court Security Officer. The Court Security Officer shall establish procedures to ensure that the secure area may be maintained and operated in the most efficient manner consistent with the protection of classified information. The Court Security Officer or Court Security Officer designee may place reasonable and necessary restrictions on the schedule of use of the secure area in order to accommodate appropriate access to all petitioners' counsel in this and other proceedings.

22. All classified information provided by the government to counsel for petitioners, and all classified information otherwise possessed or maintained by petitioners' counsel, shall be stored, maintained, and used only in the secure area.

23. No documents containing classified information may be removed from the secure area unless authorized by the Court Security Officer or Court Security Officer designee supervising the area.

24. Consistent with other provisions of this Protective Order, petitioners' counsel shall have access to the classified information made available to them in the secure area, and shall be allowed to take notes and prepare documents with respect to those materials.

25. Petitioners' counsel shall not copy or reproduce any classified information in any form, except with the approval of the Court Security Officer or in accordance with the procedures established by the Court Security Officer for the operation of the secure area.

26. All documents prepared by petitioners or petitioners' counsel that do or may contain classified information (including without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Court) shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have received an appropriate approval for access to classified information. Such activities shall take place in the secure area on approved word processing equipment and in accordance with the procedures approved by the Court Security Officer. All such documents and any associated materials containing classified information (such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, exhibits) shall be maintained in the secure area unless and until the Court Security Officer advises that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to counsel for the government unless authorized by the Court, by petitioners' counsel or as otherwise provided in this Protective Order.

27. Petitioners' counsel shall discuss classified information only within the secure area or in another area authorized by the Court Security Officer, shall not discuss classified information over any standard commercial telephone instrument or office intercommunication system, and shall not transmit or discuss classified information in electronic mail communications of any kind.

28. The Court Security Officer or Court Security Officer designee shall not reveal to any person the content of any conversations she or he may hear by or among petitioners' counsel, nor reveal the nature of documents being reviewed by them, or the work generated by them, except as necessary to report violations of this Protective Order to the Court or to carry out their duties pursuant to this Order. In addition, the presence of the Court Security Officer or Court Security Officer designee shall not operate as a waiver of, limit, or otherwise render inapplicable, the attorney-client privilege or work product protections.

29. Petitioners' counsel shall not disclose the contents of any classified documents or information to any person, including counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those authorized pursuant to this Protective Order, the Court, and counsel for the government with the appropriate clearances and the need to know that information. Except as otherwise specifically provided by Judge Colleen Kollar-Kotelly in her well-reasoned opinion addressing counsel access procedures regarding petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi in Al Odah v. United States, 02-CV-0828 (CKK), counsel for petitioners in these cases are presumed to have a "need to know" information both in their own cases and in related cases pending before this Court. Therefore, and except as provided with respect to the three petitioners in Al Odah mentioned above, counsel for all petitioners in these cases who have satisfied all necessary prerequisites and follow all procedures set forth herein may share and discuss among themselves classified information to the extent necessary for the effective representation of their clients. Counsel for respondents may challenge the "need to know" presumption on a case-by-case basis for good cause shown.

30. Petitioners' counsel shall not disclose classified information not provided by petitioner-detainee to that petitioner-detainee. Should petitioners' counsel desire to disclose classified information not provided by petitioner-detainee to that petitioner-detainee, petitioners' counsel will provide in writing to the privilege review team (See Exhibit A) a request for release clearly stating the classified information they seek to release. The privilege review team will forward the petitioner counsel's request to the appropriate government agency authorized to declassify the classified information for a determination. The privilege review team will inform petitioners' counsel of the determination once it is made.

31. No petitioner or counsel for petitioner shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in these cases except as otherwise provided herein.

32. Except as otherwise stated in this paragraph and to ensure the security of the United States of America, at no time, including any period subsequent to the conclusion of the proceedings, shall petitioners' counsel make any public or private statements disclosing any classified information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are classified. In the event that classified information enters the public domain, however, counsel is not precluded from making private or public statements about the information already in the public domain, but only to the extent that the information is in fact in the public domain. Counsel may not make any public or private statements revealing personal knowledge from non-public sources regarding the classified or protected status of the information or disclosing that counsel had personal access to classified or protected information confirming, contradicting, or otherwise relating to the information already in the public domain. In an abundance of caution and to help ensure clarity on this matter, the Court emphasizes that counsel shall not be the source of any classified or protected information entering the public domain.

As stated in more detail in paragraph 49 below, failure to comply with these rules may result in the revocation of counsel's security clearance as well as civil and/or criminal liability.

33. The foregoing shall not prohibit petitioners' counsel from citing or repeating information in the public domain that petitioners' counsel does not know to be classified information or a classified document, or derived from classified information or a classified document.

34. All documents containing classified information prepared, possessed or maintained by, or provided to, petitioners' counsel (except filings submitted to the Court and

served on counsel for the government), shall remain at all times in the control of the Court Security Officer for the duration of these cases. Upon final resolution of these cases, including all appeals, all such documents shall be destroyed by the Court Security Officer.

Access to Protected Information and Documents

35. Without authorization from the government or the Court, protected information shall not be disclosed or distributed to any person or entity other than the following:

a. petitioners' counsel, provided such individuals have signed the Acknowledgment, attached hereto as Exhibit C, attesting to the fact that they have read this Protective Order and agree to be bound by its terms; and

b. the Court and its support personnel.

36. The execution of the Acknowledgment is a condition precedent for petitioners' counsel to have access to, or continued access to, protected information for the purposes of this proceeding. A copy of each executed Acknowledgment shall be kept by counsel making the disclosure until thirty (30) days after the termination of this action, including appeals.

37. The substitution, departure, or removal of petitioners' counsel from these cases for any reason shall not release that person from the provisions of this Protective Order or the Acknowledgment executed in connection with this Protective Order.

38. Petitioners' counsel shall not disclose the contents of any protected documents or information to any person, to include counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those authorized pursuant to this Protective Order, the Court, or counsel for the government. Except as otherwise specifically provided by Judge Colleen Kollar-Kotelly with respect to counsel for petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi in Al Odah v. United States, 02-CV-0828 (CKK), counsel for petitioners in these coordinated cases may share protected information with each other but only to the extent that counsel have appropriate

security clearances and that all other procedures set forth in this Protective Order are complied with. Petitioners' counsel shall maintain all protected information and documents received through this proceeding in a confidential manner.

39. Petitioners' counsel shall not disclose protected information not provided by petitioner-detainee to that petitioner-detainee without prior concurrence of counsel for the government or express permission of the Court.

40. No petitioner or counsel for petitioner shall disclose or cause to be disclosed any information known or believed to be protected in connection with any hearing or proceeding in these cases except as otherwise provided herein.

41. At no time, including any period subsequent to the conclusion of the proceedings, will petitioners' counsel make any public or private statements disclosing any protected information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are protected.

42. Protected information shall be used only for purposes directly related to these cases and not for any other litigation or proceeding, except by leave of the Court. Photocopies of documents containing such information shall be made only to the extent necessary to facilitate the permitted use hereunder.

43. Nothing in this Protective Order shall prevent the government from using for any purpose protected information it provides a party. Nothing in this Protective Order shall entitle another party to protected information.

44. Supplying protected information to another party does not waive privilege with respect to any person or use outside that permitted by this Protective Order.

45. Within sixty (60) days of the resolution of these actions, and the termination of any appeals therefrom, all protected documents or information, and any copies thereof, shall be promptly destroyed, provided that the party to whom protected information is disclosed certifies

in writing that all designated documents and materials have been destroyed, and further provided that counsel for the government may retain one complete set of any such materials that were presented in any form to the Court. Any such retained materials shall be placed in an envelope or envelopes marked "Protected Information Subject to Protective Order." In any subsequent or collateral proceeding, a party may seek discovery of such materials from the government, without prejudice to the government's right to oppose such discovery or its ability to dispose of the materials pursuant to its general document retention policies.

Procedures for Filing Documents

46. Until further order of this Court, any pleadings or other document filed by a petitioner shall be filed under seal with the Court through the Court Security Officer unless the petitioner has obtained from the Court Security Officer permission, specific to a particular, non-substantive pleading or document (e.g., motions for extensions of time, continuances, scheduling matters, etc.) not containing information that is or may be classified or protected, to file the pleading or document not under seal. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall promptly examine the pleading or document and forward it to the appropriate agencies for their determination whether the pleading or document contains classified information. If it is determined that the pleading or document contains classified information, the Court Security Officer shall ensure that portion of the document, and only that portion, is marked with the appropriate classification marking and that the document remains under seal. If it is determined that the pleading or document contains protected information, the Court Security Officer shall ensure that portion of the document, and only that portion, remains under seal. Any document filed by petitioner that is determined not to contain classified information or protected information, and is not subject to any other restrictions on disclosure, shall immediately be unsealed by the Court Security Officer and placed in the public record. The Court Security

Officer shall immediately deliver under seal to the Court and counsel for the government any pleading or document to be filed by petitioners that contains classified information or protected information. The Court shall then direct the clerk to enter on the docket sheet the title of the pleading or document, the date it was filed, and the fact that it has been filed under seal with the Court Security Officer.

47. Any pleading or other document filed by the government containing classified information shall be filed under seal with the Court through the Court Security Officer. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall serve a copy of any classified pleadings by the government upon the Petitioner at the secure facility.

48. Nothing herein shall require the government to disclose classified or protected information. Nor shall anything herein prohibit the government from submitting classified information or protected information to the Court *in camera* or *ex parte* in these proceedings, or entitle petitioners or petitioners' counsel access to such submissions or information. Except for good cause shown in the filing, the government shall provide counsel for the petitioner or petitioners with notice served on such counsel on the date of the filing.

Penalties for Unauthorized Disclosure

49. Any unauthorized disclosure of classified information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Protective Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of Court and possible referral for criminal prosecution. See e.g., Executive Order 12958, as amended. Any breach of this Protective Order may also result in the termination of access to classified information and protected information. Persons subject to this Protective Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United

States or may be used to the advantage of an adversary of the United States or against the interests of the United States. Persons subject to this Protective Order are also advised that direct or indirect unauthorized disclosure, retention, or negligent handling of protected documents or information could risk the security of United States government personnel and facilities, and other significant government interests. This Protective Order is to ensure that those authorized to receive classified information and protected information will not divulge this information to anyone who is not authorized to receive it, without prior written authorization from the original classification authority and in conformity with this Protective Order.

50. The termination of these proceedings shall not relieve any person or party provided classified information or protected information of his, her, or its obligations under this Protective Order.

IT IS SO ORDERED.

November 8, 2004

/s/
JOYCE HENS GREEN
United States District Judge

Exhibit A

EXHIBIT A

REVISED PROCEDURES FOR COUNSEL ACCESS TO DETAINEES AT THE U.S. NAVAL BASE IN GUANTANAMO BAY, CUBA

I. Applicability

Except as otherwise stated herein or by other Order issued in the United States District Court for the District of Columbia, the following procedures shall govern counsel access to all detainees in the control of the Department of Defense ("DoD") at the U.S. Naval Base in Guantanamo Bay, Cuba ("GTMO") by counsel for purposes of litigating the cases in which this Order is issued.

These procedures do not apply to counsel who are retained solely to assist in the defense of a detainee in a trial by military commission. Access by that counsel is covered by the Procedures for Monitoring Communications Between Detainees Subject to Trial by Military Commission and their Defense Counsel Pursuant to Military Commission Order No. 3.

II. Definitions

A. Communications: All forms of communication between counsel and a detainee, including oral, written, electronic, or by any other means.

B. Counsel: An attorney who is employed or retained by or on behalf of a detainee for purposes of representing the detainee in the United States District Court for the District of Columbia and who is admitted, either generally or pro hac vice, in this Court. Unless otherwise stated, "counsel" also includes co-counsel, interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

C. Detainee: An individual detained by DoD as an alleged enemy combatant at the U.S. Naval Base in Guantanamo Bay, Cuba.

D. Privilege Team: A team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee. If required, the privilege team may include interpreters/translators, provided that such personnel meet these same criteria.

E. Legal Mail: Letters written between counsel and a detainee that are related to the counsel's representation of the detainee, as well as privileged documents and publicly-filed legal documents relating to that representation.

EXHIBIT A

III. Requirements for Access to and Communication with Detainees

A. Security Clearance:

1. Counsel must hold a valid current United States security clearance at the Secret level or higher, or its equivalent (as determined by appropriate DoD intelligence personnel).

2. Counsel who possess a valid security clearance shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the agency who granted the clearance. Access will be granted only after DoD verification of the security clearance.

3. Counsel who does not currently possess a Secret clearance will be required to submit to an application for clearance to the Department of Justice, Litigation Security Division.

B. Acknowledgment of and Compliance with Access Procedures

1. Before being granted access to the detainee, counsel will receive a copy of these procedures. To have access to the detainee, counsel must agree to comply fully with these procedures and must sign an affirmation acknowledging his/her agreement to comply with them.

2. This affirmation will not be considered an acknowledgment by counsel that the procedures are legally permissible. Even if counsel elects to challenge these procedures, counsel may not knowingly disobey an obligation imposed by these procedures.

3. The DoD expects that counsel, counsel's staff, and anyone acting on the behalf of the attorney will fully abide by the requirements of this document. Counsel is required to provide the DoD with signed affirmations from interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation, upon utilization of those individuals by counsel in a manner that implicates these procedures.

4. Should counsel fail to comply with the procedures set forth in this document, access to or communication with the detainee will not be permitted.

C. Verification of Representation

1. Prior to being permitted access to the detainee, counsel must provide DoD with a *Notification of Representation*. This Notification must include the counsel's licensing information, business and email addresses and phone number, as well as

the name of the detainee being represented by the counsel. Additionally, counsel shall provide evidence of his or her authority to represent the detainee.

2. Counsel shall provide evidence of his or her authority to represent the detainee as soon as practicable and in any event no later than ten (10) days after the conclusion of a second visit with the detainee. The Court recognizes that counsel may not be in a position to present such evidence after the initial meeting with a detainee. Counsel for detainees and counsel for respondents shall cooperate to the fullest extent possible to reach a reasonable agreement on the number of counsel visits allowed. Should counsel for a detainee believe that the government is unreasonably limiting the number of visits with a detainee, counsel may petition the Court at the appropriate time for relief.

3. If the counsel withdraws from representation of the detainee or if the representation is otherwise terminated, counsel is required to inform DoD immediately of that change in circumstances.

4. Counsel must provide DoD with a signed representation stating that to the best of counsel's knowledge after reasonable inquiry, the source of funds to pay counsel any fees or reimbursement of expenses are not funded directly or indirectly by persons or entities the counsel believes are connected to terrorism or the product of terrorist activities, including "Specially Designated Global Terrorists," identified pursuant to Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) or Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995), and (b) counsel has complied with ABA Model Rule 1.8(f).

D. Logistics of Counsel Visits

1. Counsel shall submit to the Department of Justice (DoJ) any request to meet with a detainee. This request shall specify date(s) of availability for the meeting, the desired duration of the meeting and the language that will be utilized during the meeting with the detainee. Reasonable efforts will be made to accommodate the counsel's request regarding the scheduling of a meeting. Once the request has been approved, DoJ will contact counsel with the date and duration of the meeting.

2. Legal visits shall take place in a room designated by JTF-Guantanamo. No more than two attorneys (or one attorney and one assistant) plus one interpreter/translator shall visit with a detainee at one time, unless approved in advance by the Commander, JTF-Guantanamo. Such approval shall not be unreasonably withheld.

3. Due to the mission and location of the US Naval Base at Guantanamo Bay, Cuba, certain logistical details will need to be coordinated by counsel prior to arrival. This includes arrangements for travel and lodging. Specific information regarding these issues will be provided by DoJ.

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4. In order to travel to GTMO, all counsel must have a country and theater clearance for that specific visit. In order to begin processing country and theater clearances, counsel must have confirmed flight information for travel to GTMO and a valid current United States security clearance at the Secret level or higher, or its equivalent (as determined by appropriate DoD intelligence personnel). Country and theater clearances require twenty (20) days to process. Accordingly, counsel shall provide DoD, through DoJ, with the required information no later than 20 days prior to the GTMO visit date, or as soon as a visit is scheduled. Requests for visits made inside of 20 days will not normally be granted.

IV. Procedures for Correspondence Between Counsel and Detainee

A. Mail Sent by Counsel to Detainee ("Incoming Mail")

1. Counsel shall send incoming legal mail for a detainee to the privilege team at the appropriate address provided by government counsel. Each envelope or mailer shall be labeled with the name of the detainee and shall include a return address for counsel sending the materials. The outside of the envelope or mailer for incoming legal mail shall be labeled clearly with the following annotation: "Attorney-Detainee Materials-For Mail Delivery to Detainee."

2. Each page of legal mail shall be labeled "Attorney-Detainee Materials." No staples, paper clips or any non-paper items shall be included with the documents.

3. Upon receiving legal mail from counsel for delivery to the detainee, the privilege team shall open the envelope or mailer to search the contents for prohibited physical contraband. Within two (2) business days of receipt of legal mail, and assuming no physical contraband is present, the privilege team shall forward the mail to military personnel at GTMO in a sealed envelope marked "Legal Mail Approved by Privilege Team" and clearly indicating the identity of the detainee to which the legal mail is to be delivered. The privilege team shall return to the sender any incoming mail that does not comply with the terms of paragraphs IV.A.1., 2.

4. Within two (2) business days of receipt of legal mail from the privilege team, personnel at GTMO shall deliver the envelope or mailer marked by the privilege team as "Legal Mail Approved by the Privilege Team" to the detainee without opening the envelope or mailer. If counsel desires confirmation that the documents were delivered to the detainee, counsel is responsible for providing a stamped, self-addressed envelope for that purpose. The detainee shall be responsible for mailing any confirmation of delivery to counsel as outgoing legal mail. This method shall be the sole and exclusive means by which confirmation of delivery is provided to counsel.

EXHIBIT A

5. Written correspondence to a detainee not falling within the definition of legal mail shall be sent through the United States Postal Service to the appropriate address provided by government counsel. Non-legal mail includes, but is not limited to, letters from persons other than counsel, including family and friends of the detainee. These non-privileged communications will be reviewed by military personnel at GTMO under the standard operating procedures for detainee non-legal mail.

6. Counsel is required to treat all information learned from a detainee, including any oral and written communications with a detainee, as classified information, unless and until the information is submitted to the privilege team and determined to be otherwise by the privilege team or by this Court or another court. Accordingly, if a counsel's correspondence contains any summary or recitation of or reference to a communication with a detainee that has not been previously determined to be unclassified, the correspondence shall be prepared, marked, transported and handled as classified material as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information and Security Supplement to DOD Regulation 5200.1R.

7. Written and oral communications with a detainee, including all incoming legal mail, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

B. Mail Sent by Detainee to Counsel ("Outgoing Mail")

1. Detainees will be provided with paper to prepare communications to counsel. In the presence of military personnel, the detainee will seal the written communication into an envelope and it will be annotated as "Attorney-Detainee Materials-For Mail Delivery To Counsel." Each envelope shall be labeled with the name of the detainee and the counsel. Envelopes annotated with the name of persons other the detainee's counsel (including family/friends or other attorneys) shall be processed according to the standard operating procedures for detainee non-legal mail.

2. Military personnel will collect the outgoing legal mail within one (1) business day of being notified by the detainee that the communication is prepared for sealing and mailing.

3. After the outgoing legal mail is collected from the detainee, the envelope will be sealed into a larger envelope by military personnel at Guantanamo which will be marked as "Attorney-Detainee Materials-For Mail Delivery To Counsel" and will

be annotated with the name of the detainee and the counsel. The envelope will be sealed and mailed in the manner required for classified materials. Within two (2) business days of receipt from the detainee, the communication will be mailed to the appropriate address as provided by government counsel.

4. Detainees also are permitted to send non-legal mail, including written communications to persons other than counsel, through the United States Postal Service. These communications shall be reviewed by military personnel at Guantanamo under the standard operating procedures for detainee non-legal mail.

5. In the event any non-legal correspondence or messages from a detainee to individuals other than his counsel (including family/friends or other attorneys) are sent to counsel as, or included with, legal mail, counsel shall return the documents to military personnel at GTMO for processing according to the standard operating procedures for detainee non-legal mail.

V. Materials Brought Into A Meeting With Detainee And Counsel

A. Counsel shall bring only legal mail, writing utensils and paper into any meeting with a detainee unless counsel has received prior approval from the Commander, JTF-GTMO. The Commander shall not unreasonably withhold approval for counsel to bring into a meeting with a detainee letters, tapes, or other communications introducing counsel to the detainee, if the government has first reviewed the communication and determined that sharing the communication with the detainee would not threaten the security of the United States.

B. Written and oral communications with a detainee, including all documents brought into a meeting with a detainee, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

VI. Materials Brought Out Of A Meeting With Detainee and Counsel

A. Upon the completion of each meeting with a detainee or during any break in a meeting session, counsel will give the notes or documents used or produced during the meeting to a designated individual at Guantanamo. These materials will be sealed in the presence of counsel and will be handled as classified material as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.

B. Upon the completion of the counsel's visit to Guantanamo, the notes or documents used or produced during the visit shall be sealed in the presence of

counsel and placed in an envelope labeled as "Attorney-Detainee Meeting Documents–For Delivery to Counsel." The envelope shall be sealed into a larger envelope by military personnel at Guantanamo which shall be marked as "Attorney-Detainee Meeting Documents-For Mail Delivery To Counsel" and shall be annotated with the name of the detainee and the counsel. The envelope shall be sealed and mailed in the manner required for classified materials. Within two (2) business days following the completion of the counsel's visit to Guantanamo, the package shall be mailed to the appropriate address provided by government counsel.

C. Correspondence or messages from a detainee to individuals other than his counsel (including family/friends or other attorneys) shall not be handled through this process. If a detainee provides these communications to his counsel during a visit, counsel shall give those communications to military personnel at Guantanamo so they can be processed under the standard operating procedures for detainee non-legal mail.

VII. Classification Determination of Detainee Communications

A. Counsel may submit information learned from a detainee to the privilege team for a determination of its appropriate security classification. Counsel shall memorialize the information submitted for classification review into a written memorandum outlining as specifically as possible the information for which counsel requests a classification determination. All documents submitted for classification review shall be prepared, handled and treated in the manner required for classified materials, as provided by as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R. No information derived from these submissions shall be disclosed outside the privilege team pursuant to these procedures until after the privilege team has reviewed it for security and intelligence purposes. Absent express consent given by the Court, or except as otherwise provided in this document, the submissions shall not be disclosed to any person involved in the interrogation of a detainee, and no such individual may make any use of those communications whatsoever, nor shall the submissions be disclosed to any Government personnel involved in any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee.

B. Counsel shall send all materials submitted for classification review to the appropriate address to be provided by government counsel. The outside of the envelope or mailer shall be clearly labeled "Attorney-Detainee Meeting Documents-For Classification Review By Privilege Team." Each envelope or mailer shall be annotated with the name of the detainee and the counsel. Each page of the document submitted for classification review shall be marked "Attorney-Detainee Materials" and "Classified." The envelope or mailer will be sealed and mailed in the manner required for classified materials.

C. As soon as possible after conducting the classification review, the privilege team shall advise counsel of the classification levels of the information contained in the materials submitted for review. The privilege team shall forward its classification determination directly to counsel after a review and analysis period not to exceed, from the time of receipt by the privilege team:

1. Seven (7) business days for information that is written in the English language;

2. Fourteen (14) business days for any information that includes writing in any language other than English, to allow for translations by the privilege team;

3. Twenty (20) business days for any information where the privilege team has reason to believe that a code was used, to allow for further analysis.

D. While conducting classification review, the privilege team shall promptly report any information that reasonably could be expected to result in immediate and substantial harm to the national security to the Commander, JTF-Guantanamo. In his discretion, the Commander, JTF-Guantanamo may disseminate the relevant portions of the information to law enforcement, military and intelligence officials as appropriate.

E. If, at any time, the privilege team determines that information in the documents submitted for classification review relate to imminent acts of violence, the privilege team shall report the contents of those documents to Commander, JTF-Guantanamo. In his discretion, the Commander, JTF-Guantanamo may disseminate the relevant portions of the information to law enforcement, military and intelligence officials.

F. The privilege team shall not disclose any information submitted by counsel for classification review outside the privilege team, except as provided by these procedures or as permitted by counsel submitting the information.

VIII. Telephonic Access to Detainee

A. Requests for telephonic access to the detainee by counsel or other persons will not normally be approved. Such requests may be considered on a case-by-case basis due to special circumstances and must be submitted to Commander, JTF-Guantanamo.

B. Any telephonic access by counsel will be subject to appropriate security procedures, but shall not include contemporaneous monitoring or recording.

C. Any telephonic access by persons other than counsel will be subject to appropriate security procedures, including contemporaneous monitoring and recording.

EXHIBIT A

IX. Counsel's Handling And Dissemination Of Information From Detainee

A. Subject to the terms of any applicable protective order, counsel may disseminate the unclassified contents of the detainee's communications for purposes reasonably related to their representation of that detainee.

B. Counsel is required to treat all information learned from a detainee, including any oral and written communications with a detainee, as classified information, unless and until the information is submitted to the privilege team and determined to be otherwise. All classified material must be handled, transported and stored in a secure manner, as provided by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.

C. Counsel shall disclose to DoJ or Commander, JTF-Guantanamo any information learned from a detainee involving future events that threaten national security or involve imminent violence.

D. Counsel may not divulge classified information not learned from the detainee to the detainee. Counsel may not otherwise divulge classified information related to a detainee's case to anyone except those with the requisite security clearance and need to know using a secure means of communication. Counsel for detainees in the coordinated cases pending in the United States District Court for the District of Columbia are presumed to have a "need to know" information in related cases pending before this Court. Counsel for respondents in those cases may challenge this presumption on a case-by-case basis for good cause shown.

X. JTF-Guantanamo Security Procedures

A. Counsel and translators/interpreters shall comply with the following security procedures and force protection safeguards applicable to the US Naval Base in Guantanamo Bay, Cuba, JTF-Guantanamo and the personnel assigned to or visiting these locations, as well as any supplemental procedures implemented by JTF-Guantanamo personnel.

B. Contraband is not permitted in JTF-Guantanamo and all visitors are subject to search upon arrival and departure. Examples of contraband include, but are not limited to, weapons, chemicals, drugs, and materials that may be used in an escape attempt. Contraband also includes money, stamps, cigarettes, writing instruments, etc. No items of any kind may be provided to the detainee without the advance approval of the Commander, JTF-Guantanamo.

C. Photography or recording of any type is prohibited without the prior approval of the Commander, JTF-Guantanamo. No electronic communication devices are permitted. All recording devices, cameras, pagers, cellular phones, PDAs, laptops, portable electronic devices and related equipment are prohibited in or near JTF-Guantanamo. Should any of these devices be inadvertently taken into a

prohibited area, the device must be surrendered to JTF-Guantanamo staff and purged of all information.

D. Upon arrival at JTF-Guantanamo, security personnel will perform a contraband inspection of counsel and translators/interpreters using metal detectors as well as a physical inspection of counsel's bags and briefcases and, if determined necessary, a physical inspection of his/her person.

E. Counsel shall not be permitted to interview or question members of the Joint Task Force about their duties or interactions with detainees without first obtaining permission from the Commander, Joint Task Force Guantanamo. Should permission be unreasonably denied, counsel may seek an Order from this Court granting permission for good cause shown.

F. Counsel will meet with a detainee in conference facilities provided by GTMO. These facilities are subject to visual monitoring by closed circuit TV for safety and security reasons. (The only other method of visual observation available is for the door to remain open with military police sitting outside the door.). No oral communications between counsel and detainee will be heard.

G. At the conclusion of a meeting with a detainee, counsel and translators/interpreters will again be inspected using a metal detector and, if deemed necessary, by physical inspection of their persons.

Exhibit B

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

, *et al.*	)	
Petitioners,	)	
v.	)	Civil Action No.
GEORGE W. BUSH, President of the United States, *et al.*,	)	
Respondents.	)	

MEMORANDUM OF UNDERSTANDING REGARDING ACCESS TO CLASSIFIED NATIONAL SECURITY INFORMATION

Having familiarized myself with the applicable statutes, regulations, and orders related to, but not limited to, unauthorized disclosure of classified information, espionage and related offenses; The Intelligence Identities Protection Act, 50 U.S.C. § 421; 18 U.S.C. § 641; 50 U.S.C. § 783; 28 C.F.R. § 17 et seq.; and Executive Order 12958; I understand that I may be the recipient of information and documents that belong to the United States and concern the present and future security of the United States, and that such documents and information together with the methods and sources of collecting it are classified by the United States government. In consideration for the disclosure of classified information and documents:

(1) I agree that I shall never divulge, publish, or reveal either by word, conduct or any other means, such classified

documents and information unless specifically authorized in writing to do so by an authorized representative of the United States government, or as expressly authorized by the Protective Order entered in the United States District Court for the District of Columbia in the case captioned _____ v. George W. Bush, No. _____.

(2) I agree that this Memorandum of Understanding and any other non-disclosure agreement signed by me will remain forever binding on me.

(3) I have received, read, and understand the Protective Order entered by the United States District Court for the District of Columbia in the case captioned _____ v. George W. Bush, No. _____, and I agree to comply with the provisions thereof.

_____ _____
Date

_____ _____
Date

Exhibit C

EXHIBIT C

ACKNOWLEDGMENT

The undersigned hereby acknowledges that he/she has read the Protective Order entered in the United States District Court for the District of Columbia in the case captioned _____ v. George W. Bush, No. _____, understands its terms, and agrees to be bound by each of those terms. Specifically, and without limitation, the undersigned agrees not to use or disclose any protected information or documents made available to him/her other than as provided by the Protective Order. The undersigned acknowledges that his/her duties under the Protective Order shall survive the termination of this case and are permanently binding, and that failure to comply with the terms of the Protective Order may result in the imposition of sanctions by the Court.

DATED: _____ BY: _____
(type or print name)

SIGNED: _____

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

***In re* Guantanamo Detainee Cases**	**Civil Action Nos. 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK), 04-CV-1897 (RMC)**

ORDER SUPPLEMENTING AND AMENDING FILING PROCEDURES CONTAINED IN NOVEMBER 8, 2004 AMENDED PROTECTIVE ORDER

In its November 8, 2004 Amended Protective Order, the Court set forth procedures for the filing of documents by counsel in these coordinated cases. Paragraph 46 governs the filing of documents by counsel for the petitioners and requires that all filings be first submitted under seal to the Court Security Officer ("CSO") to determine whether they contain classified or protected information. If the CSO, in consultation with the appropriate agency, concludes that a particular filing does not contain any classified or protected information, ¶ 46 requires the unsealing of the document by the CSO and the filing of the document in the public record. If the CSO, in consultation with the appropriate agency, concludes that a particular filing does contain classified or protected information, that information is to remain under seal and the unclassified and unprotected portions of the filing, if any, are to be placed in the public record. Paragraph 47 governs the filing of classified materials by counsel for the respondents and requires counsel to submit classified filings under seal to the Court through the CSO.

It has recently come to the Court's attention that some confusion and certain difficulties have arisen with respect to the filing of documents containing classified or protected information. Most of the difficulties have arisen as a result of the nature of the Court's CM/ECF electronic filing system. To clarify and, hopefully, to improve the filing system, it is hereby

ORDERED that the "Procedures For Filing Documents" contained on pages 13 through 14 of the November 8, 2004 Amended Protective Order are modified and supplemented as follows:

All documents filed by a petitioner shall be filed under seal with the Court through the Court Security Officer for determination by the appropriate agency as to whether the documents contain classified or protected information. At the time of making a submission to the CSO, the attorney shall file on the public record in the CM/ECF system a "Notice of Filing" notifying the Court that a submission has been made to the CSO and specifying in general terms the nature of the filing without disclosing any potentially classified or protected information. It is the Court's understanding that the CM/ECF system requires counsel to attach a document to any entry made by them on the system. Accordingly, the document to be attached to the Notice of Filing in the CM/ECF system shall be a one page submission repeating in general terms the nature of the filing without disclosing any potentially classified or protected information and disclosing the date and time the document was delivered to the CSO for her review.

In the event that the CSO informs counsel for a petitioner that a proposed filing does not contain any classified or protected information, counsel shall then promptly file the full submission in the CM/ECF system and counsel shall make specific reference to the earlier docket

entry notifying the Court that the document had been submitted to the CSO for review. The docket entry description shall also state that the CSO has approved of the public filing of the document. The underlying document filed in the CM/ECF system shall contain a notation in the upper right hand corner of the first page stating "PREVIOUSLY FILED WITH CSO AND CLEARED FOR PUBLIC FILING."

In the event that the CSO informs counsel for a petitioner that a proposed filing does in fact contain some or all classified or protected information, counsel shall then promptly file in the CM/ECF system a version of the document suitable for public viewing. Unless an entire document is deemed classified or protected, a "version of the document suitable for public viewing" shall mean a document in which the portions of the document containing classified or protected information are redacted. Such document shall contain a notification in the upper right hand corner of the first page stating "REDACTED VERSION FOR PUBLIC FILING CLEARED BY CSO." In the event an entire document is deemed classified or protected, a "version of the document suitable for public viewing" shall mean a one page "half sheet" containing the caption of the case, a version of the title of the document that does not disclose classified or protected information, and a brief statement that the CSO has informed counsel that the entire document is classified or protected. The docket entry description in the CM/ECF system for the document suitable for public viewing shall make specific reference to the earlier docket entry notifying the Court that the document had been submitted to the CSO for review.

Any pleading or other document filed by counsel for the respondents containing classified or protected information shall be filed under seal with the Court through the CSO. In addition,

counsel for respondents shall file in the CM/ECF system a version of the document suitable for public viewing as that phrase is defined in the preceding paragraph.

IT IS SO ORDERED.

December 13, 2004

_____/s/_____
JOYCE HENS GREEN
United States District Judge

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

***In re* Guantanamo Detainee Cases**	**Civil Action Nos. 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK)**

ORDER FOR SPECIFIC DISCLOSURES RELATING TO RESPONDENTS' MOTION TO DESIGNATE AS "PROTECTED INFORMATION" UNCLASSIFIED INFORMATION AND PETITIONERS' MOTION FOR ACCESS TO UNREDACTED FACTUAL RETURNS

On November 8, 2004, respondents filed a motion for designation of certain information as "protected" pursuant to the Court's Amended Protective Order. Counsel for petitioners filed a response saying they were unable to take a position on the respondents' motion until they had an opportunity to review the material the respondents sought to have deemed "protected." On November 22, 2004, respondents filed a submission stating that petitioners could identify the material at issue by comparing the classified factual returns provided to counsel at the secure facility with the factual returns filed on the public record. Counsel for respondents argued that because more than sixty factual returns are at issue, requiring any more specificity would be "burdensome and unnecessary." Respondents' Response to Petitioners' Motion for Access to Unredacted Factual Returns and to Compel Compliance with Order on Protected Information Procedures ("Response") at 5.

In a related matter, counsel for petitioners filed a motion on November 18, 2004 seeking access to the full classified factual returns that respondents had submitted to the Court for *in camera* review. Petitioners noted that the classified factual returns that were provided to them for review at the secure facility contained redactions of information that had been fully disclosed to the Court. Counsel for respondents filed an opposition to the petitioners' motion, claiming that the redacted materials involve sensitive information concerning intelligence sources and methods and "do not support a determination that the detainee is not an enemy combatant." Response at 7.

As provided in the Court's Amended Protective Order of November 8, 2004, it is for the Court to determine what unclassified information should be deemed "protected" and treated by all counsel with the same safeguards they would employ with respect to classified information. It is the moving party's obligation, however, to show with exact detail the specific information the party seeks to have designated as "protected." The respondents have fallen far short of the precision necessary to inform the Court and opposing counsel of the exact information they seek to be deemed "protected." Accordingly, it is hereby

ORDERED that respondents shall file with the Court Security Officer on or before December 17, 2004 two copies of the factual returns in the above-captioned cases (one copy for the Court and the other copy for counsel for the petitioners) highlighting with a colored marker the exact words or information in each factual return the respondents seek to be deemed "protected." Because the factual returns already submitted to the Court differ from the factual returns available to counsel for the petitioners, the Court wishes to make clear that it wants the marked copies submitted to the Court pursuant to this Order to be identical in all other respects to

the factual returns earlier submitted to the Court for *in camera* review but not for review by counsel for the petitioners. In addition, the marked copies submitted to counsel for the petitioners pursuant to this Order shall be identical in all other respects to the factual returns earlier submitted to counsel for the petitioners at the secure facility.

So that the Court may better understand the exact nature of the information in the classified returns that respondents have disclosed to the Court for *in camera* review but that respondents have not disclosed to counsel for the petitioners, and to assist the Court in its ruling on Petitioners' Motion for Access to Unredacted Factual Returns, it is

FURTHER ORDERED that on the copies of the factual returns submitted for the Court's review for purposes of determining what information respondents seek to be deemed "protected," respondents shall also clearly indicate with a marker of a different color all information withheld from counsel for the petitioners in the factual returns located at the secure facility. To clarify, the second color on the Court's copies of the factual returns shall be used to inform the Court of the exact information disclosed to the Court but not disclosed to counsel for the petitioners.

IT IS SO ORDERED.

December 8, 2004

/s/
JOYCE HENS GREEN
United States District Judge

EXHIBIT D

HASSAN BIN ATTASH, *et al.*,	)	
Petitioners,	)	
v.	)	**05-CV-1592 (RCL) (AK)**
GEORGE W. BUSH, *et al.*,	)	
Respondents	)	

DECLARATION OF MARC D. FALKOFF

Declarant, Marc D. Falkoff, comes now upon penalty of perjury and declares that the following is true to the best of his knowledge, recollection and belief:

1. My name is Marc D. Falkoff, and I am over eighteen years old and am in all respects competent to give this Declaration. This Declaration is submitted in support of Petitioners' Motion to Compel Privilege Team Enforcement of the Protective Order.

2. I am an attorney-at-law and a member of the bars of New York and the District of Columbia. I am admitted to practice in the federal courts in the District of Columbia. I am currently employed at the law firm of Covington & Burling. My business address is 1330 Avenue of the Americas, New York, New York 10024.

3. Covington & Burling represents seventeen Yemeni nationals being detained in Guantánamo Bay by the United States military. The firm has filed habeas petitions on behalf of each of these men in the United States District Court for the District of Columbia. Those petitions are pending before three Judges of this Court in the four above-captioned cases.

4. An identical Protective Order has been entered in each of the above-captioned actions.

5. Under the terms of the Protective Order, client interview notes taken by counsel while at Guantánamo must be surrendered by counsel to a military escort at Guantánamo, after which they will be delivered to a Secure Facility in Arlington, Virginia. Declarant has visited his clients at Guantánamo seven times. To the best of his recollection, only once have his notes arrived at the Secure Facility sooner than three weeks after they were handed off to the military escort at Guantánamo.

6. After habeas counsel complained about the glacial pace of delivery of their interview notes from Guantánamo to the Secure Facility, the military allowed counsel to transmit their notes to the Secure Facility via a secure facsimile line. The secure facsimile machine transmits at the rate of about a page every four minutes, thus requiring an entire afternoon, at least, for the transmission of a full visit's interview notes. During Declarant's last two trips to Guantánamo in December 2005 and February 2006, however, this cumbersome method of transmission was not available at all because the secure facsimile line was entirely inoperative. To Declarant's knowledge, the secure facsimile has been inoperative since December and remains inoperative today.

7. Under the terms of the Protective Order, habeas counsel may not reveal to third parties letters or statements provided by their clients at Guantánamo Bay, may not reveal to third parties notes taken during interviews of their clients at Guantánamo Bay, and may not remove from the Secure Facility any such notes, letters or statements. The only way in which such notes, letters or statements may be removed from the Secure Facility or discussed in public is for the documents to first undergo classification review by the Privilege Team.

8. Declarant has personally submitted hundreds of pages of such notes, letters and statements to the Privilege Team for classification review over the past fifteen months. No submission made by Declarant has ever been deemed classified.

9. The Privilege Team has, however, repeatedly refused altogether to review documents submitted by Declarant and his colleagues.

10. The Privilege Team refused to review a document provided to Declarant at Guantánamo by his client Yasin Qasem Muhammad Ismail. The document is a chart of medical ailments suffered by dozens of detainees at Guantánamo. The document was prepared by Mr. Ismail with the assistance of other detainees and could not reasonably have been prepared in any other manner. The chart was created in preparation for a potential motion challenging the conditions of confinement at Guantánamo, in part to demonstrate a pattern and practice of inadequate medical care provided both to Declarant's client and the other men at the camp and in part to demonstrate that the United States has failed to meet its obligations under the Geneva Conventions. The document is quite obviously privileged and can in no way be deemed a communication to or by a third party. The Privilege Team, which has no discretion to decide whether to review a document submitted to it for classification determination, nonetheless refused to review the document because it was prepared in part by another detainee. *See* Ex. A (Nov. 7, 2005 Memo).

11. The Privilege Team refused to review an affidavit drafted at Guantánamo and in Declarant's presence by another client, Abd al Malik Abd al Wahab. Mr. Wahab, like each detainee who testified during a Combatant Status Review Tribunal, had been handed a document by the military informing him that the Associated Press, as part of a Freedom of Information Act lawsuit against the military, sought the "release" of his name to the

public. Mr. Wahab, like a number of the detainees, was confused by the release form that was handed to him, in part because the form implied that the release of his name might endanger his family. He refused to sign the document until he could receive legal advice from Declarant. After Declarant described the nature of the Associated Press's lawsuit before Judge Jed Rakoff in the U.S. District Court for the Southern District of New York, Mr. Wahab stated to Declarant that he wanted his identity to be made public, that he understood the danger of keeping his name and that of the other men at Guantánamo a secret, and that he wanted to assure that the litigation in Southern District of New York would be resolved in a manner that would protect his safety and that of the other detainees. He therefore volunteered to draft an affidavit describing the reasons why he had chosen not to sign the release form, empowering me to use it in any litigation if I felt it would protect his interests. The Privilege Team likewise refused to review this document, because it was formally "addressed to the counsel for the Associated Press." *See* Ex. B (Jan. 26, 2006 Memo).

12. The Privilege Team has refused to review several letters written by another of Declarant's clients, Abdulsalam Ali Abdulrahman Al Hela, because Mr. Al Hela's letters occasionally ask habeas counsel to, in sum, tell the world about the torture he has suffered at American hands in Afghanistan and the abuse and lack of due process he has received while at Guantánamo. *See* Ex. C (Nov. 4, 2005 Memo). The Privilege Team has also refused to review letters drafted by Mr. Al Hela because they include poems that include the lines "My Dear Love" and "Dearest, forgive me." *See* Ex. D (Nov. 4, 2005 Memo).

13. In addition to refusing to review numerous documents submitted to it by habeas counsel, the Privilege Team has informed counsel that documents it designates "FOUO" are to be

treated as "protected information," meaning that they must be handled substantially as if they were classified. *See* Ex. E (Aug. 2, 2005 Memo). The Privilege Team has returned dozens of documents marked "FOUO" to Declarant and his colleagues. As discussed in the accompanying motion, the Privilege Team has absolutely no authority under the Protective Order to designate any materials as "protected."

14. On September 16, 2005, Declarant was informed by a Court Security Officer about a serious problem with the delivery of client mail to habeas counsel. Many packages of legal mail from detainees had been collected by Guantánamo personnel and addressed by them with an incorrect zip code. These packages were misdirected to the mailroom of the Department of Homeland Security rather than to the Court Security Office. Letters addressed to Declarant had been sitting in the mailroom since July and August. Declarant learned at the time from, *inter alia*, the following law firms and law schools that more than 40 pieces of legal mail from their clients had been diverted to Homeland Security from as early as June 2005 and had not been delivered to the Court Security Office until mid-September: Paul, Weiss, Rifkind, Wharton & Garrison; Sutherland Asbill & Brennan; Keller and Heckman; Dorsey & Whitney; American University Washington College of Law; Wilmer Cutler Pickering Hale and Dorr; Freedman Boyd Daniels Hollander Goldberg & Cline; and Sutherland Asbill & Brennan.

FURTHER DECLARANT SAYETH NOT.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 21, 2006.

Marc D. Falkoff

Exhibit A

PRIVILEGED MATERIAL

MEMORANDUM FOR: Court Security Officer 7 November 2005

Fm: Privilege Team

re: Attorney Notes – Third Party Communication , Covington & Burling

ref : Amended Protective Order and Procedures for Counsel Access

We have reviewed Counsels submissions and have some concerns. Counsel has submitted a document twice, once in Arabic (Item 442) and once in English (Item 447), listing medical problems among detainees.

In good faith we processed this as information from the detainee to counsel as a privileged document. In fact, this chart is, according to Yasein Ismael, the product of a Libyan, nicknamed Abu Salima. I also verified that Covington and Burling are not attorneys of Record for the other name detainee.

Since it was created by a third party who does not enjoy an attorney-client relationship with counsel, this material should not have been processed and released, and was improperly submitted.

The privilege team exists to review privileged communications between attorney and client, not to review third party communications received from or intended for others. In this case, the withholding of information related to the source and nature of the material caused us to release it as privileged when it was, in fact, not privileged and not authorized for release.

This was coordinated with privilege counsel who advised that under the protective order, we should not release this material. We have consolidated both the Arabic and English documents into a single package.

Privilege Team

cc: Privilege Counsel

The Privilege Team discussed this document w/ Jason Knott on 11/7/05 CS

PRIVILEGED MATERIAL

TOTAL P.02

Exhibit B

PRIVILEGED MATERIAL

MEMORANDUM FOR: Court Security Officer 26 January 2006

Fm: Privilege Team

re: Attorney Notes – Third Party Communications – Attorney Remes

ref : Amended Protective Order and Procedures for Counsel Access

We have reviewed the Arabic letters and translation submitted on 2 December 2005. One letter cannot be processed since it addressed to the counsel for the Associated Press, taking it outside the scope of the Amended Protective Order. All other material is marked unclassified.

Per the ref. Amended Protective Order, Exhibit A, Paragraph IV.B.5, "In the event any non-legal correspondence or messages from a detainee to individuals other than his counsel (including family/friends **or other attorneys**) are sent to counsel as, or included with, legal mail counsel shall return the documents to military personnel at GTMO for processing according to the standard operating procedure for detainee non-legal mail."

Privilege Team

PRIVILEGED MATERIAL

Exhibit C

PRIVILEGED MATERIAL

MEMORANDUM FOR: Court ~~Security Officer~~ Erich 4 November 2005

Fm: Privilege Team

re: Attorney Notes – Third Party Communication , Abdah V. Bush (04-CV-1254)

ref : Amended Protective Order and Procedures for Counsel Access

We have reviewed Counsels submission. According to the counsel's own translation and following the Muslim greeting the letter is addressed to "To David Rimes and through him to my brothers, to my family, to my people (nation) and to the government of my country and to the American public and to the world and to whomever it may concern that is happening in this detention…" Although it appears that the material is provided to counsel, he also appears to be being used as a conduit for messages addressed to others than the counsel.

Per the ref. Amended Protective Order, Exhibit A, Paragraph VI.B.5, "In the event any non-legal correspondence or messages from a detainee to individuals other than his counsel including family/friends or other attorneys) are sent to counsel as, or included with legal mail, counsel shall return the documents to military personnel at GTMO for processing according to the standard operating procedure for non-legal mail." Processing by us would constitute a violation of the Amended Protective Order.

Privilege Team

PRIVILEGED MATERIAL

TOTAL P.02

Exhibit D

PRIVILEGED MATERIAL

MEMORANDUM FOR: Court Security Officer marc 4 November 2005

Fm: Privilege Team

re: Attorney Notes – Third Party Communication , Covington & Burling

ref : Amended Protective Order and Procedures for Counsel Access

We have reviewed Counsels submission. These have not been previously submitted and are new material. We have also reviewed and returned the material which we believe was already returned to you in September but which we suspected to have not been returned previously

We have marked the Power of Attorney as For Official Use Only since it include the detainee's name and Interment Serial Number (ISN). The remaining four pages of material, according to translation, all appear to be directed to persons other than counsel. One letter specifically states "I have sent it back to you through my attorney David…" There is a poem which addresses "My Dear Love" and another poem which starts "Dearest. Forgive me…" It appears that the material is handled through counsel but is directed to a third party other than the counsel.

Per the ref. Amended Protective Order, Exhibit A, Paragraph VI.B.5, "In the event any non-legal correspondence or messages from a detainee to individuals other than his counsel including family/friends or other attorneys) are sent to counsel as, or included with legal mail, counsel shall return the documents to military personnel at GTMO for processing according to the standard operating procedure for non-legal mail." Processing by us would constitute a violation of the Amended Protective Order.

Privilege Team

PRIVILEGED MATERIAL

Exhibit E

2 August 2005

MEMORANDUM FOR: Court Security Officer

Fm: Privilege Team

Re: FOUO and Protected Information Handling

Ref: Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 8 Nov 2004

Based upon a request by some counsel, the following information is provided concerning the identification and handling of controlled unclassified information and protected information within the context of reference. This information was coordinated with Privilege Counsel. You may wish to consider including it as part of the initial briefing of counsel following granting of access.

As a bottom line, there are specific dissemination and handling restrictions on controlled unclassified information such as FOUO, and wrongful handling is subject to penalty. It should be treated and handled as protected information until it is reviewed upon filing, and determined to not fall within the category of protected information. In addition, there may be other material that is not FOUO but may be designated as Protected Information and must be handled as such.

Marking and handling of Controlled Unclassified Information, such as For Official Use Only (FOUO) and protected information is defined in DOD Regulation 5400.7R and 5200.1R (draft) for FOUO, and referenced Amended Protective Order, paragraphs 35-45 and paragraph 49, for Protected Material.

FOUO Material

Please note that each Government Department is responsible for identifying the types of information and handling rules for FOUO information. Each Department has the responsibility for releasing information that is owned by/generated by agencies within that department. Within DOD, FOUO is that information which is exempt from automatic public release under the Freedom of Information Action (FOIA), based upon one of nine exemptions.

FOUO material may not be publicly released without review or approval by the original designator of the FOUO marking. FOUO material is not exempt from release under FOIA but must be reviewed/redacted and approved by the government prior to any public release.

To assure privilege in the communication between counsel and client and in attorney work product, the privilege team makes the initial determination of FOUO based on "reasoned judgment" of the nine exemptions. In the instant habeas cases, classified and/or FOUO material must be filed under seal and must then be reviewed by the government prior to any public filing. When the information is filed a final determination is made and information is redacted for the public filing.

If Habeas Counsel wishes to have the FOUO designation reviewed, he or she must waive privilege to allow the privilege team to seek final determination from the FOUO designation authority within DOD.

Protected Information

Judge Green, in the Amended Protective Order, identified the class of Protected Information and/or Documents and defined them as, "...(A)ny document or information deemed by the court, either upon application by counsel or *sua sponte*, as worthy of special treatment as if the document or information were classified, even if the document or information has not been formally deemed to be classified." Counsel is directed to maintain all protected information and documents in a confidential manner and subject to the limitations within the Amended Protective Order.

The information may not be disclosed or distributed to any person or entity other than petitioners' counsel who have agreed to be bound by and signed the acknowledgement attached as Exhibit 3 to the Amended Protective Order and to court personnel.

Under the Amended Protective Order, petitioners' counsel includes, "(A)n attorney who is employed or retained by or on behalf of a petitioner...as well as co-counsel, interpreters, translators, paralegals, investigators all other personnel or support staff employed or engaged to assist in the litigation."

Counsel may identify persons who require access to protected material within their office, and must retain signed acknowledgements of Exhibit 3 for each individual given access to protected information. Paragraphs 41 and 42 of the Amended Protective Order identify specific restrictions and limitations on use and/or disclosure of protected information.

Access and Handling Procedures

Unlike classified information, Counsel is able to remove protected information from the secure

facility, work with it and allow it to be processed on personally owned data processing equipment.

Protected information may only be disclosed to persons directly related to the instant case, who have signed and agreed to be bound by limitations imposed by the court on the control handling and dissemination of protected material as specified in Exhibit 3 of the Amended Protective Order.

FOUO or protected data may not be filed on the public record.

Counsel may not disclose FOUO or protected information not provided by your client to them without specific leave of the court or approval by the government. The fact that detainees provide protected or FOUO information affects the ability of counsel to discuss the data with them, but does not affect further use and dissemination of the data.

Protected material may only be used in the instant habeas proceeding and may not be used in other litigation and proceedings without leave of the court.

cc: Privilege Counsel

12/5/2005

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISA ALI ABDULLA ALMURBATI, *ET AL.*, **Petitioners,** **v.** **GEORGE WALKER BUSH, *ET AL.*,** **Respondents.**	**Civil Action No. 04-1227 (RBW)** **DECLARATION OF JOSHUA COLANGELO-BRYAN IN SUPPORT OF MOTION TO COMPEL**

I, JOSHUA COLANGELO-BRYAN, declare that:

1. I am an attorney associated with Dorsey & Whitney LLP, which represents the Petitioners in Almurbati, *et al.* v. Bush, *et al.*; Civil Action No. 04-1227 (RBW). I respectfully submit this declaration in support of Petitioners' Motion to Compel.

2. In late October 2004, I visited Guantanamo Bay to meet with our clients, including Isa Ali Abdulla Almurbati. During this visit, I spoke with Mr. Almurbati for over ten hours. I took approximately 20 pages of notes during these interviews, which were far-ranging in scope. I gave my interview notes to my military escort after each interview session.

3. On October 28, 2004, at the conclusion of my visit to Guantanamo Bay, our military escort sealed all of the notes taken during the interviews with Mr. Almurbati in an envelope. This envelope was taken by our military escort with five other envelopes of interview notes, each of which contained notes of interviews with one of our clients. We were not permitted to make copies of any of the notes that were turned over to our military escort.

4. On November 16, 2004, I visited the secure facility created by Respondents in Virginia to review my interview notes. There, I learned that the notes I had taken with Mr. Almurbati had not arrived from Guantanamo Bay.

5. On November 16, 2004, I requested that the Court Security Officer ("CSO") and counsel for Respondents make efforts to locate the missing presumptively classified notes. On December 17, 2004, I received a letter from counsel for Respondents. (A true and correct copy of this letter is attached hereto as Exhibit 1). Counsel wrote that my interview notes were not sent certified mail "as they should have" and may have "simply got lost in the mail." Respondents never located these interview notes.

6. On August 10, 2005, I received an email from the CSO informing me that an envelope of my attorney-client interview notes, including an Arabic-language document drafted by one of our clients, had arrived from Guantanamo Bay on the prior day and had been submitted to the PRT for review per my note on the envelope. I made inquiries of the CSO on September 14, 15 and 20, 2005 in an attempt to determine whether the Arabic-language document had been reviewed by the PRT. As of September 20, 2005, the review had not been completed and only subsequently was the review completed. (Attached hereto as Exhibit 2 is an e-mail exchange between myself and the CSO containing the above-described communications).

7. I caused Arabic-language materials containing communications from our clients to be submitted to the PRT for review on November 15, 2005. I caused additional Arabic-language materials to be submitted to the PRT for review on November 21, 2005. The classification reviews of these materials were due to be completed by December 7 and December 14, 2005, respectively. The PRT did not respond to my November 15, 2005 submission until January 31, 2006, when it sent a memorandum stating that it would not review the materials for classification purposes. The PRT did not respond to my November 21, 2005 submission until February 9, 2006, when it sent a memorandum stating that it would not review the materials for classification purposes. (Attached hereto as Exhibit 3 is the relevant e-mail exchange between myself and the CSO regarding the failure of the PRT to review the submitted materials within applicable deadlines).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED this 21st day of February, 2006 at New York, New York.

/s/ Joshua Colangelo-Bryan
JOSHUA COLANGELO-BRYAN

EXHIBIT 1

U.S. Department of Justice
Civil Division
Federal Programs Branch

20 Massachusetts Avenue, N.W.
Washington, D.C. 20530

December 17, 2004

SENT VIA ELECTRONIC MAIL
Josh Colangelo-Bryan
Dorsey & Whitney LLP
250 Park Avenue
New York, NY 10177

Re: Almurbati et al. v. Bush et al., Civil Action No. 04-CV-1227-RBW

Dear Mr. Colangelo-Bryan:

The purpose of this letter is to address the status of the missing attorney notes that were generated during your meetings with detainee Isa Ali Abdulla Almurbati at Guantanamo Bay (GTMO) from October 24-28, 2004. At the conclusion of your visit, the notes from your meetings with the six detainees in the above case were placed into separate manilla envelopes for mailing to the Court Security Officers (CSOs) for the GTMO detainee cases at the offices of the Department of Justice, Litigation Security Division. The packages were mailed shortly thereafter. As you know, five of the six packages arrived on or about November 10, 2004. The final package of notes has not yet been located.

To be sure, the government is very concerned with the whereabouts of your notes, given that the notes presumptively contain classified national security information pursuant to the Court's Amended Protective Order. In light of this fact, the government has fully investigated the status of the missing notes; however, we regret that we have not been able to locate them. Our investigation determined that the notes were not sent via certified mail, as they should have. Nevertheless, five of the six packages, which were sent in the same fashion as the missing package, arrived without incident in a timely fashion. This incongruity is certainly confounding and leads to the possible conclusion that the notes simply got lost in the mail.

Needless to say, this explanation does little to change the fact that your confidential attorney notes are not presently in your possession. To remedy this unfortunate situation, the government immediately can arrange a return visit to GTMO for you and a translator to meet with Mr. Almurbati. Furthermore, the government will provide air transportation from Jacksonville, FL to GTMO for you and your translator free of charge.

Finally, in order to ensure timely delivery of your notes from GTMO to the CSOs, personnel at GTMO at the conclusion of your visit will make available to you a secure fax

machine. Should you desire, you may fax your notes to the CSOs, who will confirm delivery of the transmission for you.[1] Your original notes will then be sent to the CSOs via certified mail. This procedure will ensure that copies of your notes will be available for you at the secure habeas work space once you return from your trip to GTMO.

Again, the government regrets that the missing notes have not yet turned up. We hope that they will, but in any event, we have taken steps to remedy the problem going forward. Feel free to contact me at your earliest convenience to arrange your return visit to GTMO.

Sincerely,

Andrew I. Warden
Trial Attorney

[1] While I do not wish to discourage use of the secure fax, you should be aware that such faxes are very slow and sometimes take several minutes per page. Accordingly, I would recommend faxing your notes at the end of each day to avoid a lengthy session at the conclusion of your visit.

EXHIBIT 2

Colangelo-Bryan, Joshua

From: Jennifer.Campbell@usdoj.gov
Sent: Tuesday, September 20, 2005 11:49 AM
To: Colangelo-Bryan, Joshua
Subject: RE: Mail from Gtmo

I will be going over in a little bit and will check with the PRT.

You also received a letter from detainee today. It was actually addressed to the Court but was from Almurbati. I will put in the front of your drawer at the facility.

-----Original Message-----
From: Colangelo.Bryan.Joshua@dorsey.com
[mailto:Colangelo.Bryan.Joshua@dorsey.com]
Sent: Tuesday, September 20, 2005 10:42 AM
To: Campbell, Jennifer
Subject: RE: Mail from Gtmo

Jennifer,

Please let me know if the Privilege Review Team has completed its review of this document.

Thank you,
Josh

-----Original Message-----
From: Jennifer.Campbell@usdoj.gov [mailto:Jennifer.Campbell@usdoj.gov]
Sent: Friday, September 16, 2005 9:04 AM
To: Colangelo-Bryan, Joshua
Subject: RE: Mail from Gtmo

Not yet. I received a call from the PRT last night who said that the translator was having difficulty with your package and that it had taken him 2 1/2 days to do 6 pages. The PRT was trying to work with the translator to speed up the process so this can get done. I'll let you know.

-----Original Message-----
From: Colangelo.Bryan.Joshua@dorsey.com
[mailto:Colangelo.Bryan.Joshua@dorsey.com]
Sent: Thursday, September 15, 2005 5:12 PM
To: Campbell, Jennifer
Subject: RE: Mail from Gtmo

Thanks, Jennifer. Did you receive the document?

Josh

-----Original Message-----
From: Jennifer.Campbell@usdoj.gov [mailto:Jennifer.Campbell@usdoj.gov]
Sent: Thursday, September 15, 2005 9:10 AM
To: Colangelo-Bryan, Joshua
Subject: RE: Mail from Gtmo

Josh,
I just checked with the PRT and the translator has been there for the past 2 days and has been reviewing your package. They hope to have it back to me by this afternoon. I will call you as soon as I receive it.

Jennifer

-----Original Message-----
From: Colangelo.Bryan.Joshua@dorsey.com
[mailto:Colangelo.Bryan.Joshua@dorsey.com]
Sent: Wednesday, September 14, 2005 8:27 PM
To: Campbell, Jennifer
Cc: Gunning, Christine E
Subject: RE: Mail from Gtmo

Jennifer,

Could you give me an update on the Privilege Team review of the Arabic-language materials that were included in the envelope you reference in your email below as being submitted to the Privilege Team on August 10?

Per the Protective Order (VII.(C)(2)), the Privilege Team had 14 business days from August 10 to forward its classification determination to us. Obviously, we are a good deal beyond that deadline.

Thanks,
Josh

-----Original Message-----
From: Jennifer.Campbell@usdoj.gov [mailto:Jennifer.Campbell@usdoj.gov]
Sent: Wednesday, August 10, 2005 10:42 AM
To: Colangelo-Bryan, Joshua
Cc: Christine.E.Gunning@usdoj.gov
Subject: Mail from Gtmo

Josh,
We received an envelope from Gtmo on 8/9/05 from you. You have noted that you would like it to be reviewed by the Privilege Team. This will be submitted to the Privilege Team for you later today.

Thank you,
Jennifer Campbell
Security Specialist
Litigation Security Section
(202) 514-9016

EXHIBIT 3

Colangelo-Bryan, Joshua

From: Jennifer.Campbell@usdoj.gov
Sent: Wednesday, December 28, 2005 6:17 PM
To: Colangelo-Bryan, Joshua
Subject: Re: Review of Letter; Almurbati et al 04-1227

Josh,
I am very sorry to tell you that the PRT informed me today that your documents have not yet been reviewed due to problems obtaining translators (the translator they were using was sent to Iraq). I'm really sorry. The only other way I can think of to get this back sooner, may be for you to have it translated first by your cleared translator and submit the english version with the arabic version? That's the only thing I can think of. They are trying to get this resolved and I understand that this is not acceptable. Please let me know if you'd like me to get it back from the PRT for you so you can make other arrangements.

Feel free to call me on my cellphone at 202-532-5419.

Jennifer

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Colangelo.Bryan.Joshua@dorsey.com <Colangelo.Bryan.Joshua@dorsey.com>
To: Campbell, Jennifer <Jennifer.Campbell@SMOJMD.USDOJ.gov>
Sent: Tue Dec 27 16:02:38 2005
Subject: RE: Review of Letter; Almurbati et al 04-1227

Jennifer,

Hi. I hope the holidays were good.

I was hoping to get an update with respect to the document addressed below for which a PRT review was due to be completed on December 7.

In addition, we have exchanged emails regarding another document for which a PRT review was due to be completed by December 13/14.

I very much need these documents, which are long overdue.

I would appreciate if you could advise me as to the status of both documents.

Thanks,
Josh

-----Original Message-----
From: Colangelo-Bryan, Joshua
Sent: Monday, December 19, 2005 12:44 PM
To: 'Jennifer.Campbell@usdoj.gov'
Subject: RE: Review of Letter; Almurbati et al 04-1227

Jennifer,

Thank you for your message. Please let me know when there is progress on this issue.

Josh

-----Original Message-----
From: Jennifer.Campbell@usdoj.gov [mailto:Jennifer.Campbell@usdoj.gov]
Sent: Wednesday, December 14, 2005 7:44 AM
To: Colangelo-Bryan, Joshua

Subject: RE: Review of Letter; Almurbati et al 04-1227

Yes. Unfortunately, the PRT is has been having trouble obtaining arabic translators recently. He believes the issue has been worked out and should have a translator there this week. I'm really sorry about this. I'll have it faxed to you as soon as we get it.

-----Original Message-----
From: Colangelo.Bryan.Joshua@dorsey.com [mailto:Colangelo.Bryan.Joshua@dorsey.com]
Sent: Tuesday, December 13, 2005 1:49 PM
To: Campbell, Jennifer
Subject: FW: Review of Letter; Almurbati et al 04-1227

Jennifer,

Have you been able to follow up with Kent on this issue?

Thanks,
Josh

> -----Original Message-----
> From: Colangelo-Bryan, Joshua
> Sent: Friday, December 09, 2005 3:14 PM
> To: 'Jennifer.Campbell@usdoj.gov'
> Subject: Review of Letter; Almurbati et al 04-1227
>
> Jennifer,
>
> On November 15, 2005, I requested that a letter written by one of my clients be reviewed by the PRT. I made the request over the phone to one of the staff at the Secure Facility, who told me that the letter would be given to the PRT that day.
>
> By my calculations, the PRT deadline for providing us with a classification decision was December 7, 2005 because the document was in Arabic. We have not received any word from the PRT about the document. Could I ask you to check as to the status of the review.
>
> My apologies for having to raise these issues with you always, but I understand that we cannot communicate directly with Kent about them.
>
> Have a good weekend.
>
> Josh
>
> Joshua Colangelo-Bryan
> Dorsey & Whitney LLP
> 250 Park Avenue
> New York, NY 10177
> (212) 415-9234
>

EXHIBIT F

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

KHALED A.F. AL ODAH, et al.,	:	
Petitioners,	:	
v.	:	Civil Action No. 02-828
UNITED STATES OF AMERICA, et al.,	:	Monday August 16, 2004
Respondants.	:	Washington, D.C.
MAHOMOUD HIBIB, et al.,	:	
Petitioners,	:	
v.	:	Civil Action No. 02-1130
GEORGE BUSH, ET AL., et al.,	:	Monday, 10:32 a.m. August 16, 2004
Respondants.	:	Washington, D.C.

Transcript of Motions Hearing
Before the Honorable Colleen Kollar-Kotelly
United States District Judge

APPEARANCES:

For the Petitioners: THOMAS WILNER, ESQ.
JOSEPH MARGULIES, ESQ.

For Respondents: BRIAN D. BOYLE, ESQ.
TERRY MARCUS HENRY, ESQ.

Court Reporter: JUDY BROWN
Miller Reporting Company
735 8th Street, S.E.
Washington, D.C. 2003
(202) 546-6666

P R O C E E D I N G S

THE CLERK: This is Civil Case 02-828 Khaled A.F. Al Odah, et al., versus United States of America, et al. Thomas B. Wilner for the plaintiff. Terry Marcus Henry and Brian Boyle for the defendants.

This is also civil case 02-1130 Mahomoud Hibib versus George Bush. For the plaintiff is Joseph Margulies. For the defendant is Terry M. Henry, Brian D. Boyle, and Thomas R. Lee. These are both motions hearings.

THE COURT: Good morning, everyone. In terms of Al Odah is it Mr. Wilner that will be speaking?

MR. WILNER: Yes.

THE COURT: Who is going to be speaking for the government?

MR. BOYLE: Brian Boyle, Your Honor, unless I misstep.

THE COURT: Mr. Margulies, you're here for Mr. Hibib and to--I take it you're appealing both of these cases, Mr. Boyle; is that correct?

MR. BOYLE: Yes.

THE COURT: Let me do a couple of preliminaries. I want you to assume that I've read

all of the briefs in the cases. If you're raising an argument or legal authority that's not in the briefs, please bring that to my attention as part of your argument so I'm not wondering whether I should have read it and didn't.

I obviously will need for a final decision to go through the matters much more quickly than I've had to at this point. A very thorough analysis will be required. So, I haven't made a decision yet as of this juncture.

I've set out time limits for counsel for your prepared remarks. I'm going to ask that you do that at the end. I have some questions that I want to start with, and I would like to clarify briefly with Mr. Margulies, in terms of Rasul case, if I could just ask, since two the petitioners have been released and the third one was Mr. Hicks, who has taken a different route, is there any reason why that case should remain on the docket or can it be dismissed.

I'd ask that you come and use the microphone. We have two microphones, that one and there's another portable one.

MR. MARGULIES: Yes, Your Honor. I think as to Mr. Rasul and Mr. Iqbal, the habeas cases may

be dismissed. They are no longer in any custody, U.S. or otherwise, so I think under the habeas Statute they are no longer candidates for habeas relief.

I would say, however, that to the extent there are other non-habeas actions that may be brought, the Alien Tort Statute for instance, those cases remain viable as to Mr. Rasul and Mr. Iqbal and all potential detainees. So, that is why we have not taken any action with respect to those two--with respect to that case in particular.

Mr. Hicks presents a somewhat different situation, Your Honor. He certainly has alien tort claims that are viable. He has separate counsel for the purpose of commission proceedings.

The only reason I--I hesitate in making any representations about the habeas for Mr. Hicks, Your Honor, is that the government has always maintained that they are completely separate tracks, that the habeas action is distinct from the commission proceedings.

As I read their pleadings, I think they continue to maintain that today. So, I would not want to suggest that by going forward with just the commission proceedings, that Mr. Hicks would be

adequately served.

So, until the government makes its position more clear in this regard, we have not done anything to change Mr. Hicks' status in front of this court.

THE COURT: I would just simply ask if the government and Mr. Margulies could have some discussion about this to make sure--at some point I will focus back on the Rasul case and I'll leave it to you to bring it to my attention at what point we need to move forward on it.

MR. MARGULIES: Very good, Your Honor.

THE COURT: In terms of the issues to discuss this morning, there are a number of issues that have been raised and I'm going to focus on what I view as the principal ones, which is the monitoring of attorney/client discussions, which relate at this point I believe to three detainees, the review by the privilege team of notes by attorneys from meetings with the client detainee, leaving the meeting with the notes, and bringing to the meeting notes or any other kind of material. Then there's legal mail from the detainee to the attorney and back from the attorney. I would see those as related and the principal issues.

There are a couple of other issues in terms of the acknowledgement of representation by the detainee as to whether it needs to be done in one or more meetings. I can hear your comments relating to that. There's an issue about the top secret clearance. The government has taken the position, which I think is accurate, they don't do clearances unless they're needed. In terms of the Kuwaiti attorney, which I believe now the petitioners seem to be taking the position that he would be used not as an interpreter, but to introduce the American attorneys in order to gain the confidence of the detainee.

The petitioners seem to be offering that this introduction, I'll call it, can be monitored. It would be strictly in the context of--of introduction. The government has indicated that they, with review, that they have no problems with either letters from families being brought or a videotape or something else that would be an introduction to the detainees or give them some confidence in terms of this process. I to some degree think I would leave it to you to figure out which way appears to be the better way to approach it.

There are several other issues that I've not touched on that I think I will label as involving logistics and resources issues. They affect uniformly all the detainees and counsel who are going to file any kind of habeas petitions. They're more procedural and I think there may be other forums to resolve them, so I'm not going to address them today. I'm going to focus it as I've indicated.

Let me start with monitoring of the attorney/client detainee conversations. The government proposes that as to three detainees, and I'm going to state this in summary form. It's obviously a little more elaborate than this, but a privilege team from the government would monitor through audio and videotape all detainee attorney conversations. They could stop the discussions if certain classified material was being disclosed by the detainee and/or if the detainee was discussing something related to knowledge of future terrorist acts or threats to national security, something of that nature.

The privilege team would review for classification purposes the information. If it was they viewed it as future threats or a threat to

national security, they would disclose this to the camp commander for his decision whether to disseminate it or could disseminate to appropriate authorities.

They've indicated they would not disclose to government representatives in the habeas actions or other proceedings whether they're commissions tribunals, et cetera, the information that they are monitoring. So, there would be a wall that would be erected.

Now, as I understand it, and again this is more in summary form, the government's relying on the claim of a lack of a constitutional right to counsel in these proceedings, habeas proceedings, as the principal legal basis that supports these proposed conditions for attorney access, including this monitoring.

Now, what I would like to do for my part in terms of raising some issues with you, I would like to put aside for a moment whether or not the detainees have constitutional rights to counsel. You can argue that later. But for purposes of my discussions and my questions this is the framework that I would like to set out.

There are several existing frameworks that

are supported by legal precedent, which I think can inform the decision of monitoring of attorney/client conversations and materials. The first is appointment of--the court's discretion to appoint counsel in the habeas context, the second is attorney/client privilege and the case related to that, and the third is the use and disclosure of classified information. All of these frameworks have legal precedent of one sort or another.

Now, I would note at the beginning that besides the argument that there's no constitutional right to counsel, which presumably is as I understand the government's argument the basis for their getting a privilege of counsel, but the rest of the things that would be associated with the appointment of counsel are not--not rights that the detainee would have. That the only legal support for basically abrogating the attorney/client privilege is this Bureau of Prison regulation that allows certain instances monitoring of attorney/client conversations. I didn't see any other cases that actually discuss this.

It hasn't been tested in court. The Padia (phonetic) case the court--Supreme Court has found there was no jurisdiction for the lower court to

make any rulings, so the opinion of the lower court is null and void.

It did cite to the VOP regulation and indicate that, of course, there could be monitoring, but it doesn't contain any legal analysis. So, even though it has no precedential value, doesn't have any reasoning that the court could consider in terms of making a decision.

Judge Walton of this court in Ala Walli (phonetic) versus Ashcroft did have the issue of this VOP regulation, but he found there was no standing, because the regulation was not applied to the plaintiff. I don't know at least in terms of reported decisions any other decisions out there that have discussed that regulation in terms of its legality and there don't appear to be any other cases that I could see that are cited or that I'm aware of in the review that I've done that actually address the issue of being able to monitor.

So, let me start with the framework I've set out and then I have some questions that will flow from that. In terms of the habeas, which is a statutory context, and the Supreme Court determined in this these cases that the courts have jurisdiction to hear petitioners' habeas claims

pursuant to the habeas statute governing federal prisoners, which is Section 2241.

Now, the case law surrounding the habeas statute, which is 2241; the state habeas, which is 2254; the All Writs Act, which is Section 1651; allows the court to fashion procedures by analogy to establish procedures in aid of the court's jurisdiction in order to develop a record as necessary for the court to make a decision on the merits of petitioners' claims, and that's the Harris Supreme Court case.

And the habeas petitioners are entitled to present their claims and their facts to the court, and the court is authorized to appoint counsel to assist them in that process. Now, the habeas statutes don't specifically address the appointment of counsel, so it's not a right; but certainly the All Writs Act states that the courts may issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law.

The Criminal Justice Act under Section 3006(a) allows the use of public funds to appoint counsel where justice requires, and it specifically states the 2241 federal habeas as well as 2254, the

state cases.

By analogy to 2254 there's some rules. Rule 8 again authorizes, doesn't require but authorizes, appointment of counsel pursuant to CGA at any stage of the proceedings; also by analogy 2254, there's really no difference between them, there certainly have been cases and the Eighth Circuit has won where they indicated that--set out sort of when you should consider appointing counsel for a petitioner in a habeas action and in that case found that they were entitled to appointment of counsel. And it talked about the factual legal issues are sufficiently complex, numerous, and appointment of counsel would benefit both the petitioner and the court by allowing counsel to develop petitions or argument and focus the court's analysis and sets out a series of factors, which I think most judges probably would consider, certainly whether the claim is frivolous, the ability of the petitioner to investigate the facts or present claims, and the complexity of the factual and legal issues.

So, here we obviously have a non-frivolous claim. The petitioners are held virtually incommunicado, they're unable to investigate the

facts surrounding their detention, nor can they be expected I think to grapple with the complex legal issues surrounding their detention.

So, I think in sum is a strong argument for appointment of counsel, even if petitioners didn't already have counsel, at least in the one case I have, so certainly in the interest of justice, which I think is the standard, in order to litigate these actions before the court.

I say that because I think there is--there is a framework for appointment of counsel. And with that appointment of counsel, comes the attorney/client relationships and the privilege. In this jurisdiction it's very strict. If information is disclosed, it's deemed waived, even if it was inadvertent.

Now, let me go through a couple of other sort of background things before I set out sort of my hypothetical. If under 1.6(c) and (d) of D.C. Code of Conduct Related Professional Responsibility the attorney may disclose or the court can order if the attorney gets material from his client. In other words you need to disclose it to prevent a criminal act if the attorney believes it's likely to result in death or substantial bodily harm. So,

there is certainly a provision in there and the court is in a position to actually order it.

So, for discussion purposes I want you to assume the following, and then I'm going to have some questions at the end: Assume that the attorney/client privilege attaches and so you have one attorney. I know petitioners want more, but let's deal with one attorney, not the law firm, the paralegals, the associates, or anybody else, we're talking about one attorney wherein they would have attorney/client privilege. The information from the detainee that would be discussed with the attorney would be confidential and not monitored; assume also that as offered generally by the petitioners that this attorney/client privilege information would not be disclosed to anyone, unless the government would have an opportunity to review it for classification purposes, which may prevent disclosure, and the government also has to approve any disclosure, except obviously filings in court, and we can talk about how that would be done.

So, in sum no detainee information disclosed as part of the these attorney/client conversations, would be disclosed without

classification review and without government approval, except for court pleadings. Assume also that the court would order consistent with the D.C. Code of Professional Responsibility that the attorney is required to disclose to the government any information from the detainee involving future events that threaten national security or involve immediate violence, I'm talking about future events. You have to work out the language obviously, but it certainly would take care of the concerns about information that could be disclosed relating to that. Assume also that the attorney cannot disclose to the detainee classified material that he hears from other sources. The security clearance, which I'll get to in a moment, addresses these kind of issue, since obviously the detainee is not going to have a security clearance. So, to the extent the attorney has reviewed government material that's classified, that information would not be disclosed.

Also assume that the attorney has a security clearance at a level to cover whatever the detainee may know and disclose to counsel relating to Guantanamo Bay security or other intelligence issues that the government is concerned about.

The--certainly the government would know what the detainee knows relating to this. This isn't something you wouldn't be aware of, so you certainly would know what kind of level of security the attorney would have to have in order to learn this material, again not being able to disclose it without the government's classification review and approval except for court pleadings, which I separate out.

Now, the security clearance means that the attorney is trustworthy to both hear the information at whatever the level is, not disclose it, if it's inappropriate, they do receive training from the unit--the court security unit, which is a neutral organization that does this at the request of the court, and they do the training depending on the level of security and what access the individual will have to classified material.

The training and handling classified information, they're expected to follow the rules on the use and disclosure of classified material; and, again, you're not going--you can't disclose it to the detainee who is not going to have a classification review and they're not going to be able to disclose it with others without the

government having some sense of level of security is required and classification. The court, for instance, enter a protective order, which I think has been done in other cases.

There are obviously sanctions relating to the misuse or disclosure of information. Frankly, it probably would be fairly easy to track back, because all of the information is going to be fairly specific to each of the detainees in terms of what information they're likely to disclose. I mean, there are criminal offenses that are in the statutes that go up to the death penalty.

I'm going to deal separately with the attorney notes and the legal mail, because I think they present some different issues, but why doesn't this, as I've proposed it, some of which the petitioners have proposed, some of which I've gone through and perhaps made it narrower than the petitioners would like in some instances and/or broader in terms of some of the disclosures, why doesn't this resolve the government's concerns that they've raised as to the need for the monitoring of these conversations, and I'm only talking about between the attorney/client in terms of what we ordinarily view as the privileged information and

are there additional strictures that you would propose besides monitoring that you think would be necessary. So, let me hear from the government first.

MR. BOYLE: For the time being, I will spare Your Honor some threshold points I wanted to make about the legal setting, the fact that we're in a context--we find ourselves in a context that we've never been before with litigation on behalf of enemy alien combatants and who were detained overseas outside of sovereign territory. I want to turn to that, because I do think there are some signals we've gotten already from the Supreme Court from other quarters in the law that help us in address what is a unique situation.

THE COURT: Let me interrupt. I don't disagree that this is a unique situation, including what I'm setting out for you to respond to, and it's unique in many different ways.

I left the constitutional issue separately. I'll let you argue that during your prepared remarks if you wish to, but what I wanted to do since the constitutional issues clearly are going to be making new law, I looked at frameworks that already exist where there is some legal

precedent for doing them to focus on those initially in terms of going through it. I agree that there are some issues even with the way I've set it out that would need to be clarified, but let me hear back.

MR. BOYLE: I was less focusing on the high decibel questions whether the Constitution extends to Guantanamo and more to the Supreme Court's analysis, and Hamdi would respect more citizens who had constitutional rights presumably where the court made very clear that whatever process is undertaken has to be sensitive to the burdens that would be placed on the executive and time of act of hostilities. Indeed I think they went on to say, for example, that hearsay would be admissible--

THE COURT: That's correct.

MR. BOYLE: --in such proceedings, which is not typically a staple of the criminal process, at least after Crawford.

So, I think there are some signals that Supreme Court has already sent that this is an area where--with respect to the national secrets, we need to be especially differential.

But let me answer the questions you have

posed, and my answers come in--I have two basic responses to the court's construct here.

The first is--as I understand the court's proposal, the first is that the procedure would I think be flatly unworkable, and indeed it might even be more intrusive on the process of attorney/client consultation. The reason is--

THE COURT: Let me just say that's a choice that counsel can make. The choice it seems to me is monitoring, which they may decide to do, or the choice would be something narrower.

MR. BOYLE: Sure. I don't purport to speak for them. They'll obviously have their own perspective on it.

Here's why I think it's unworkable, potentially more intrusive. What you're essentially proposing, Your Honor, and what the petitioners proposed is to treat every scrap of information that they obtain in connection with the case, every scrap as classified, even though, of course, we have no authority to classify information except in accordance with the appropriate executive orders, but the idea is that--

THE COURT: Let me interrupt for a second

if I could. I'm sorry to keep interrupting. I broke out purposely, and let me explain this why I did this. I broke out the conversations, which I'm starting with you, the issue of the notes and the materials and legal mail are an issue that I'm going to start with them, because I do think it raises some other issues that I don't know if they've thought of, addressed, or whatever, so I'm going to get in--but I broke it down to conversations in terms of the--of the monitoring. You would under this--under your monitoring be doing some classification review. So, it seems to me that if they have the information and they want to disclose, you're going to get--you're going to be doing the classification review. So, either way you would be doing classification review. So, why is it more--why is it unworkable?

MR. BOYLE: Only with respect to what is written down by attorneys as they leave the room.

THE COURT: Let's discuss conversations, that's why I started with. The conversation--because the monitoring is audio and video, and let's leave the notes out or whatever they write up and legal mail, it's the conversations that they're having. Let's assume

there's no notes here at this point and it's strictly the conversations. Why isn't this what's been proposed, and I'm just throwing it out to get a response for it, address each of the concerns you have.

MR. BOYLE: Well, it's hard for me to tease out the two, at least for this purpose, because I think that the global suggestion that's made here is that all information will be--all of the conversations, all of the information gleaned from the conversations will be treated as classified, even though it may not be.

THE COURT: Well, they can decide if they think they can't do their own classification, but they certainly can decide--if they don't think it's classified decide to share it with you, you say no, and then they can do something else with it, but we're back to the conversations. Why doesn't this take care of all of the concerns you've raised in your pleadings?

MR. BOYLE: Well, I will concede that the concern about workability is I guess more pronounced with respect to any proposal that doesn't involve classification review, because it seems to me that absent some sort of process for

identifying and assigning protection to information that is part of the nation's secrets, counsel would have to do all of the work, have all of their conversations about the case in secured classified information facilities, which Your Honor's familiar with. Even the move casual of conversations about the case would have to occur in a secured area. They couldn't do any work on their computers and so forth, but I understand--

THE COURT: I want to talk to them, because I--they're going have to make some choices on their end as well about this, but let me just as I said, I focused more on the conversation aspect of it in part because the monitoring they're talking about is the monitoring--one aspect of it is the monitoring of the conversation and this privilege team stopping certain information coming out. One was concern about future events that you would want to know about, which it seems to me that--assuming they have the security clearance which involves a decision that they're trustworthy, et cetera, and what's incumbent in that, then it seems to me that at the level they would need to know whatever information is going to come out, you would know, frankly, in terms of any intelligence

concerns what the detainee is likely to know at least about that to make sure that they have the appropriate level. These are all things that would need to be done. If they're not done, then the choice may not be no monitoring.

MR. BOYLE: Well, I want to quarrel with the court's assumption that we know everything the detainee knows right--

THE COURT: All I'm saying is in terms of you raised two issues, as I understood it, in terms of--I'm summarizing broadly, but the areas where the monitoring was most important one was future threats, which seems to me, so there's no ambiguity, the court could order it setting it out specifically in the context of future events, national security, et cetera; and, two, the area where they--the detainee would start to disclose information security about Guantanamo Bay or some other--you were vague about this other intelligence concerns, whatever they are.

That in that respect you would certainly know what these concerns were, because you would know what was involved in terms of, to some degree, his original detention and whatever happened to him before he came to Guantanamo as well as what

happened Guantanamo. So, you would know what level of security the lawyers would actually need.

MR. BOYLE: Well, I think we might know a bit about the context of--of capture such that we could evaluate and assess the risks of disclosure of specific kinds of information coming from the detainee.

Let me get to the crux of the matter and that is with respect to these three detainees, and there's only three of them, the--I think it's evident to the military experts, and merits difference from the court, that simply having classification review is not going to be sufficient here.

The idea that we should have a regime in which these lawyers agree to treat everything they derive from the detainee as confidential, leaves, we believe, the government exposed in certain respects. There's an old adage I guess it's popularized by self-factorization professionals, something like if everything is top priority, then nothing is top priority.

And without monitoring with respect to these detainees who our information suggests and the information before the court will try to use

their conversations with counsel not only to potentially identify future threats, but probably more immediately to pass information through their lawyers that may be--may seem entirely innocent, to use their lawyers to pass coded messages to compromise in important respects national security.

What we have here is a situation in which these lawyers, who grant it we're going to give them a security clearance and they can be trusted once they know what's classified to keep it confidential, but we're creating a situation where attorneys without any experience before this date in treating classified information without any experience in dealing with intelligence matters are going in, going to have a conversation, and they will have no way to sort--given their training, sort what may seem to be innocent and which may actually be innocent from that which would compromise sources and methods of U.S. Intelligence.

Let me give you an example. Conversation gets under way--and this is purely hypothetical, since I've not been on the ground at Guantanamo and I'm not privy to intelligence information.

The hypothetical is by virtue of the

circumstance of this capture. The detainee, suspects or may even know that his capture was facilitated by somebody who he believes to be working with U.S. Intelligence, and the guys are saying well, here's somebody who might be able to help me. He can be found here or through other means may be able to identify--may be able to pass information through the lawyer in such a way that would compromise that individual who facilitated his capture.

Another example is--

THE COURT: Let me stop you here, so that we don't run on too long and I forget what I want to respond to.

There's two things that you've raised; one is the issue of--part and parcel of the--the security clearance is the additional training that is actually provided. They probably haven't done much at this point.

I've talked very briefly to the security unit, and they've had conversations with Chief Judge Hogan, but there is, and I know from another role that I have, that they're very careful about presenting precisely what you can and cannot do in extraordinary detail. Therefore, it seems to me

that once they are aware of what information the individual is likely to get, then they will give you the kinds of instructions that will relate to that.

Grant it, I don't know whether these attorneys have ever had security clearances and there may be attorneys that have never had security clearances or ever dealt with security matters, that certainly isn't the first time that's ever happened and that they're accustomed to--they're very professional. They're accustomed to making sure that people understand very clearly what it is that's being presented to them. I mentioned the sanctions not to be dramatic, but to simply point out that these are very serious things and the expectation would be that counsel would take it seriously.

If you provide them with information that--I assume at some point they're probably going look at some government information that's going to be classified. They're not in a position and should know that they can't pass this information on back to the detainee who has no--is not going to be open to classification.

These cases are not going to be easy to

litigate, but the point is that I don't know that--why the security clearance with the appropriate instruction is not--as long as it's at the level of the information likely for them to be received and the fact that they appear to be willing to simply reveal nothing--they're going know what the detainee told them--to reveal nothing about it without telling you.

So, you get to decide whether it's something, you know, innocuous or it's a coded--potential coded message, or it's really classified information and shouldn't be passed on. So, you'll have the classification review and you'll be in a position if you think it's a coded message to say no, you can't tell X, Y, and Z, or whoever it is. They talked about their parties. I put it in terms, so there's no misunderstanding, they don't get to disclose it, period, other than court.

MR. BOYLE: Understood. Look, there's a certain measure of trust that we're going to rely on here as well by virtue of the fact that they're going to have a security clearance. We will trust them to protect classified information that's identified to them once it's identified, but we're

not going to train them to be intelligence officers or counter terrorists.

THE COURT: That's why if they want to reveal it, they go to the experts, you.

MR. BOYLE: I go back to my earlier point that if, and this is the judgment of the military experts here, an agreement by which counsel will purportedly treat everything as classified until they tell us first, treat everything as confidential and not breathe a word about the case until they check with us first, leaves open a risk of inadvertent disclosures, you know, conversations overheard, other possible compromises of information and only monitoring, which will allow us at the conclusion of the conversation at the very least to brief counsel and tell them, you know, precisely what they've heard and how that is to be protected and call attention to the specific information that requires protection. That is the procedure that in the judgment of the military experts who know these three detainees better than in anyone else is--is required.

Let me make another point, and I know I'm--to some extent I'm muddying the waters between monitoring and classification review, but Your

Honor mentioned the fact that we have--we not only have the protection that would be offered by the court, but we also have laws respecting disclosure of classified information.

It's not clear to me that unless the lawyers involved here have their attention specifically called to particular information and are told that that information is classified and needs to be protected, it can't be disclosed any further, it's not clear to me that the criminal statutes would even apply.

In other words, imagine just we're--

THE COURT: Well, we're taking the position, at least they seem to agree--and I'll hear from them as to whether they disagree with the way I've interpreted it, I've narrowed it a little bit and broadened it in other respects--what I've interpreted their saying is that they would view everything as classified unless it's shown to you and it becomes unclassified.

So, if they think some information they've been provided and they wish to disclose it, or however they want to do it, you will have the opportunity to make this decision as to whether it is or is not classified and whether or not it can

be disclosed and to whom.

You would you have this opportunity to do so. What it keeps inviolate at least is the attorney/client relationship and the privilege and hopefully some communication between them.

MR. BOYLE: We're relying a lot on the attorneys in terms what they write down, and what we're able to review afterward. I think that is--raises some issues. We're also, in terms of trying to interpret what kinds of information the detainee may be trying to pass through the attorneys, we're going to be relying in significant measure on that attorney's perceptions of what he herds and how that information was processed. It's going to deprive us of the firsthand opportunity through monitoring to see precisely what information the detainee is attempting to pass.

Again, you know, the backdrop here is, of course--and I think there's some sort of presumption of regularity that has to attach here. This privilege team is not going to be associated as Your Honor observed with any part of the habeas process, with any part of the tribunal process.

The only time information would ever be revealed would be to--to law enforcement

authorities to stop the imminent violence or otherwise to prevent damage to national security.

THE COURT: Well, obviously the other aspect of this would be if they happened to say something of interest to you from a intelligence perspective, you would have this information, which wouldn't be used in the habeas proceedings or in any other--the commissioner or the tribunals, but certainly you would have it from intelligence value.

MR. BOYLE: Your Honor makes a good point. I mean, it may be that as this process unfolds with respect to these three detainees, that the military experts will conclude that monitoring is not required any longer.

Indeed that is what has happened in the case of both Mr. Stadea (phonetic) and Hibib. There is no monitoring that is taking place, even though there are procedures for that.

But, you know, I go back to what I said earlier. If we are--if the intelligence experts are forced to rely on the information as it is described by the lawyers, as they write things down at Guantanamo as opposed to what they might write down when they get back to their offices, what they

might recall when they get back to their offices.

There is a grave danger that information that will be of the most sensitive sort that could compromise individuals who assisted in the capture and detention of these folks, it could identify what operations or facilities have already been revealed to the U.S. government and, therefore, are compromised, the risk of just an inadvertent disclosure becomes that much greater. Again, the principal being if everything is top priority then nothing is top priority.

And, you know, our intelligence experts based on the key knowledge of these three detainees believe that monitoring in this instance is the only way to effectively call attention to the precise information that requires the highest degree of protection.

THE COURT: Since I put it in the context of the court has authority to appoint counsel is my--your argument on the constitutional is that they're not--they don't have a constitutional right to counsel; therefore, they're being allowed counsel and, therefore, somehow the attorney/client privilege or any of those rights doesn't apply.

MR. BOYLE: There are layers of arguments,

Your Honor. We start there. There's been no ruling that constitutional rights are available to these detainees in Guantanamo. I recognize that's the ultimate merits question and that the court should be reluctant to reach that ultimate merits question now.

But beyond that, we've argued that, and I think with sound authority, that this isn't a criminal proceeding. Therefore, Fifth and Sixth Amendment rights to counsel aren't applicable. We've noted that--

THE COURT: Let me just interrupt you for a second. I'm going give you an opportunity, so I won't let you use this time--

MR. BOYLE: I apologize.

THE COURT: No. I'll give you an opportunity to fully set out your prepared remarks on this issue. There is no--you would agree, I take it, that other than this Bureau of Prisons regulation, there's really nothing else legally that discusses monitoring of attorney/client discussions; am I correct? I didn't see anything. Is there anything else that's how it there that authorizes this?

MR. BOYLE: Well, Your Honor mentioned

Padia, and I know you put it to one side, but this was Judge McKazie's (phonetic) suggestion for how to accommodate national security concerns, which were concededly great in that context.

THE COURT: I can use the portion of it that talks wonderfully about why in a writ you need an attorney and the authority of the court to appoint one, but since they vacated that--in essence, vacated it and made it null and void.

The problem that I have is that there is no reasoning in it. I mention that, because it talks about well, yes, you can you do monitoring and cites to the VOP, but it doesn't have any analysis of why this regulation is legally supportable. So, I don't have any reasoning there in which to be convinced one way or other.

MR. BOYLE: Understood. Let me make a couple other observations that slightly afield of the monitoring issue, which are--which developed in the briefs, but I think are appropriate to mention here.

One of the concerns that the government is raising with respect to the risks posed by these attorney/client--or attorney/detainee consultations is that if indeed the conversations you used to

further acts of violence, acts of terrorism, or to pass information that would compromise national security, those particular communications aren't protected by the attorney/client privilege at all.

THE COURT: That's correct. That's why I said to you there--I mean, there is a framework out there. They're not protected. They would be required. And if they have any doubt about it, I will put it in a court order in terms of the language. It makes it very clear cut what they're required to do. It's not protected.

MR. BOYLE: Let me link that up, though, to the other concern I mentioned, which is that these individuals, though they will have training in protecting classified information, information that is identified to them as classified, that's all part of the security clearance, they will have know way of knowing the intelligence side of the equation. They're not going to be trained in intelligence and counter terrorism and is every reason--we have no reason to believe that they'll be able to identify what the critical information is, what the coded messages are, and that's--that's the reason we I think are appropriately insisting on the--on the opportunity to monitor conversations

with these three detainees.

Now, let me--the context that are slightly afield of monitoring where even in the criminal setting, there have been I suppose you could describe them as intrusions on the pristine attorney/client privilege--

THE COURT: None of them involve monitoring.

MR. BOYLE: Well, they're slightly afield, but there are some examples we put out in the brief, I think it's one of the cases that both sides cite, the Ben Laden, El Hague case where--and this is fairly common, as Your Honor may know, where classified information was made available solely to counsel and not to the client. The reason being, of course, the client didn't have a security clearance and wasn't likely to get one.

THE COURT: That's exactly what I'm talking about here. Am I not discussing it in the same way?

MR. BOYLE: My point is the petitioners erect this presumption that the attorney/client consultation is inviolate, there could nothing that pressures that relationship that makes the attorneys, at least in some respects, agents of the

state and that's just not the way the law is.

In the case of the Ben Laden, El Hague case one of the areas of conversation that is off limits, even though it's arguably important to preparing a defense is the discussion of classified information. Only counsel sees it.

THE COURT: I've looked at those two cases and I would not that El Hague does not have anything about monitoring. The Ben Laden case does talk and discusses the security clearances and the procedures and things that are involved, and obviously what I proposed to have some limitations on what they get to do and what they would ordinarily do in a regular case in order to--and they would be making choices as to whether they would accept something like what I've proposed and/or they would go with the monitoring.

I think in terms of the--there are some aspects of it, but none of them as far as I could see have anything to do with monitoring, which I think is quite intrusive. I mean, I think there's a 1977 case, I was trying to find it, that in a note--I think it's Weatherford, talks about, it was a prisoner, et cetera, but did in a footnote at least note that, you know, the fear that the

government is electronically eavesdropping will inhibit the attorney/client communications. So, at least there's some acknowledgment--and this is not going to be covert--

MR. BOYLE: Grant it. The case also held that unless and until information obtained from that monitoring was introduced as part of the criminal proceeding, there was Sixth Amendment violation.

THE COURT: That's right. I'm talking about strictly the relationship, communication in terms of--which is what I'm discussing in terms of the both privilege, and one of the issues relating to this is the--the issue in terms of, you know, whether this is conducive to people actually being able to operate as a client and an attorney.

MR. BOYLE: We said at the outset we're in a setting, Your Honor, that we haven't been in before with respect to enemy alien combatants being confined outside the territorial sovereignty of the United States who are bringing habeas litigation through next friends.

All the Rasul court said, of course, is that there is jurisdiction to hear to petitioner. But as I mentioned in the Hamdi case, even with

respect to citizens, the court made clear that the process that would be owing would have to take account of the burden on the executive and time of hostilities, and particular account of national security concerns.

Again, we have information before the court from the military experts, intelligence experts who know these three detainees better than anybody else, at least with respect to the intelligence dimension, who have made clear that there is reason to believe that they would use conversations with their lawyers for--not for purposes of preparing a factual defense, or whatever defense they could muster in this proceeding, but rather to further terrorist operations, to compromise U.S. national security.

And I explained why I think it is unreasonable for the Department of Defense to have to rely on lawyers who have no experience in intelligence matters, no training at all to identify what they're dealing with, to know what their experiencing, and that is the problem we've got, and monitoring is--grant it, it's unusual, but it is the only way we can identify the bits of information that may seem entirely innocent to

these lawyers without that training that, in fact, would be devastating if released. The intrusion is no greater than necessary to accomplish that objective. At the risk of repeating myself, I guess I will stop.

THE COURT: All right. Let me here from the petitioners at this point. If you want to respond to some of the concerns he's raised and then I do have an issue about notes and legal mail, et cetera.

MR. WILNER: Thank you. Good morning, Your Honor.

THE COURT: Morning.

MR. WILNER: I'm going to just address your proposal. Let me say that in starting though that I'm really sorry we have to be here today in front of you, because I think this is something we should have been able to work out.

Let me say also that the last statement by government counsel was absolutely wrong. They're so-called expert did not address at all our proposal that we would not disclose any information. He did not address that at all. He simply didn't consider the alternative.

Our goal is a very straightforward one.

We want to be able to provide these people with effective representation and we want to do so in a way that does not compromise national security, that's our only goal.

I want to note that one of the cases or the main case they rely on, assuming there are no constitutional rights is this Turner v Southly (phonetic), which has nothing really to do with the administration of a prison. And what we're talking about here is administration of justice in your courtroom.

But even in that case they said you don't even impose a restriction, any restriction. It didn't have to do with counsel restrictions. If there are reasonable alternatives available, then what we tried to do is propose a reasonable alternative.

I think Your Honor has--there's no doubt in our mind that monitoring of conversations--and by the way anticipating the disclosure of notes as well--would destroy the attorney/client relationship by destroying the confidentiality of communications.

Let me just stress the privilege team that government counsel spoke about is really not

disclosing as part of the cases against these detainees, really isn't a solution. First of all, I don't know whether people would believe it; but second of all, they could--they could really use it in other ways.

If I went in to interview a detainee, the next day the interrogators could say look, this is what you said to Mr. Wilner. We're going to interrogate you about that, I mean, that's in their proposal, so it doesn't solve it.

We proposed something very close to what you proposed, and we--we agree with your proposal. We think it absolutely protects the disclosure of--of potentially harmful information.

And--and let me make another point. Interestingly--I think you have gone further. In making that proposal, we realized its restrictive on us. It is much more restrictive than the lawyers currently representing detainees at Guantanamo, but we think in order to have confidential communications with our clients is so essential that we are willing to accept these--these conditions.

What the government pointed out in their brief as the main risk to security was that we

would be used as witting or unwitting conduits of information, coded messages to the outside world. The proposal you made absolutely cuts that off. Your proposal I think wisely goes further. The government did not suggest, as you have, that the detainees might disclose information which they think would be intelligence value to them for the future.

I think they realize, and we all realize, is Mr. Fox said in his affidavit: The lawyers cannot be used as information gatherers for the government. It would be improper to send us in there for that purpose. But I think the Code of Ethics does allow us to disclose if we come into knowledge of an imminent threat that we can disclose it and we would be very acceptable to an order ordering us to do so. So, I think your proposal addresses all of the right issues. I have just one minor concern.

THE COURT: I need to talk to you about the notes and legal mail and stuff, but go ahead.

MR. WILNER: The only concern I have is you said that if--that we should have a security clearance commensurate to what information the detainees have. There's a little wiggle room I

worry about with the government on this. The government first told us that the people at Guantanamo did not have classified information. We specifically asked them: Has there been any designation of classified information in their control, and they said no.

Then they told us we need to monitor, and one of the reasons was they said, well, they may have top secret information and you're only having secret security clearances. So, I said, well, my goodness, then give us top secrete security clearances.

I just don't want them--I don't know really what information people in detention for two and a half years, you know, outside the country could really have that's dangerous, but I don't want that to--to be a problem here. The real issue, let me just say, is that whatever we get, whatever we get, we will not disclose to anyone without their approval or Your Honor's approval in terms of disagreement.

THE COURT: I think in terms of the clearances, I think the procedure that they have is that if there is an appeal within justice and it can't come to the court, so if there is some

dispute at some later point about what level or what there is, I--you know, I indicated I thought the government should be aware of whatever it is they're concerned about, because they would certainly have some sense of what potentially--and I'm not sure some of this information would be relevant having looked at Hamdi about how they--Hamdi was a citizen, but certainly even in Hamdi they narrowed sort of what you would look at for habeas in terms of enemy combatants and what they were doing at the time that the government claims they were enemy combatants, which doesn't get into what happens to them afterwards, at least not under the--not under their habeas.

It may raise some other issues at a later point, but I think in terms of the clearances that they're not going to give you a clearance unless they think there is some information that's going to come at that level, which I think is the usual procedure.

But I think the way to answer it is not to monitor is to give you the--assuming you can get it--but give you the clearance--decide the clearance level and then see if the person meets that clearance level.

MR. WILNER: I think the ultimate--the ultimate protection for national security is we cannot disclose anything. We're not going be a conduit for coded messages or anything else.

But let me mention another thing too. Government counsel said that we're not experienced or wise enough to really understand classifications, and that may be true. I think we're trustworthy enough, but I think your proposal included the appointment of a court security officer.

The court security officer who is a neutral officer could really work--I would suggest that when we meet after our clearances, they indicate they are neutral. They will work directly with this for our--to go through our information, to train us in it to do that, and we would be willing, by the way, to take additional training if the government wants to do that. They do that for many people who are--we would be willing to do all this, but the court-appointed security officer I believe is he very good thing, which answers those questions as well.

THE COURT: I don't know whether--I guess maybe, Mr. Margulies, you had--actually all of you

had--let me raise it with you and then I'll raise it also with Mr. Margulies.

The issue with the one sort of I guess logistic issue is that obviously the conversations, the notes that would be taken in such a meeting, and I'll start with those, would ordinarily be covered by the privilege.

Now, the attorneys can't do your--you can't do your own classification of what the information is in terms of looking at the notes and deciding well, yes, I can reveal it or I can't, just as you can't with the conversations, which means that you're not going to be able to take it with you without having it--this may in working it out may turn out that there are certain things you will want to have reviewed that you think is not a problem, if they agree that information can be taken out.

But some of this information--and frankly it's going to be an issue if you want to look at material that the government has, and I assume you will, it's going to be classified. You're not going to be able to carry it off on a commercial airliner.

There's going to be issues about secure

computers, if you're going to write any pleadings that have this information in it to file it in the court. There's going to be issues about storage, which they've raise as a logistic issue, which I think is, you know, not something inappropriate. I don't see the notes as being so voluminous, frankly, that, you know, that there shouldn't be an issue, but it is something that needs to be discussed. I wasn't sure whether you've considered it or the proposals.

I mean, legal mail ordinarily if you're sending something to a prisoner or something, they have procedures for how it's done. You can't send classified material through the mail. So, unless somebody looks at it to tell you no, it's not classified, you're not going to be able to really take a lot of this out.

MR. WILNER: Your Honor, what we were told, and perhaps I'm mistaken, but the security clearance officer who briefed us, and actually it isn't me, it's other people, said that what they--first of all as we understand it that the depository for information will not be Guantanamo, but it will be in Washington, we were told, which makes sense, because we're really not talking about

the administration of just--of prison down there, but rendering justice in your courtroom here. So, that the depository will be up here.

What the security officer told us that any material will just be sent, and this is the way it's done, by registered mail to that depository, as we understand it, to the Justice Department in Washington and that we will only use a secure--and they've offered to come over and set up a secure computer for us, a secure room, and to review any of the material still. Even the material or notes that the security officer doesn't think are classified, we would still agree not to disclose to anyone without approval of the government.

Let me say with respect to notes, I do feel strongly about this. I think what people could do is simply not take notes during conversations, and that's what the court in Hickman said is wrong, reviewing attorney notes leads to shark practices and lousy lawyering. It's just not the way to do it and it intrudes on the--on the relationship in an Upjohn. They simply you can't do it, unless there's a compelling necessity and no alternative.

THE COURT: I'm not suggesting you not

take notes. I'm just raising a practical problem for you that I just wondered had you given some consideration that this information, unless it's shown so it's not--there's some determination by the government that it's not classified--and you may get into a system where you're able to separate this out, and we won't know until you start it--but that there is an issue of your not just being able to take it out.

I mean--and without getting into the different levels, I want you to be aware that there are going to be issues about where your notes are kept, how you get to take them in and out, or how you get to use them in terms of not the typical things you would have for--as an attorney where you would be careful of notes of your client, especially in this district even an inadvertent disclosure and that's the end of your privilege. The--but that's in terms of the classified material.

I think it's something that can be worked out. I'm suggesting I work it out today. I just was curious as to whether you had thought through--I raised it because of the legal mail, which I'll hear from Mr. Margulies. I mean, that

may create some difficulties in terms of the legal mail going back and forth, how that is planned to be done. There may be limits on how that gets to be done at all.

MR. WILNER: We have thought it through but probably not to the total details, because we really haven't been able to discuss with the government a way to resolve this short of monitoring or reviewing the notes.

But we recognize that there will be severe restrictions on our access to all documents and to notes. The security officer has cleared us, has assured us this can all be worked out and with--in details and we will be trained to do it, but we realize there will be restrictions on that.

Our big restriction, our commitment, is we will not disclose anything without government approval or your approval which protects national security, we believe. And as I said, I think the order that we do disclose information dangerous information comes out in accordance with our ethical obligations, I think that would be a good addition. Is that.

THE COURT: I think that's answered it.

Mr. Margulies, anything you wish to add

that has not been discussed and then--you had sort of raised the notes, but to some degree the legal mail, which I thought since your client is not being proposed to be monitored--

MR. MARGULIES: Yes, Your Honor. Let me propose what I envision, at least, for the answer to the note conundrum. Notes taken in Guantanamo what I anticipate is the way to resolve that is that they will be sealed in a bag that does not leave the island and that the government cannot get access to and is mailed to the Department of Justice, the depository that's going to be wherever it's going to be, here or New York or wherever, and stored in the secured place and then can only be opened by us when we are back in the secured place, which seems to resolve the concern that we take something in an unsecured fashion. It be secured in our presence at Guantanamo unread, unexamined, and sent to a place where only secured people can get access under secured conditions.

I agree with Mr. Wilner that I--we would accept the conditions that you've described--as you point out, Mr. Hibib is not one of the candidates for monitoring. The only reason I--I take any position on it at all is because of what I perceive

as an ambiguity in the government's position, and it could be that they no longer assert this.

It seemed that they were suggesting that there would be some sort of after-the-fact review of my conversations with Mr. Hibib by the privilege team, that is sort of a debriefing.

In their first pleading to the court they suggested that the substance of oral conversations with a detainee, even if not contemporaneously monitored, would be the--would be the subject of debriefing by the privilege team. So, that's just an after-the-fact monitoring.

If they retreated from that, then Mr. Hibib has no dog in this fight, but to the extent that's what they're talking about we would object and urge the same thing the court has envisioned.

That's all I have about this. If there are other questions that Your Honor--I have other observations I want to make, but as to what we've talked about so far, that's all.

THE COURT: In terms of the legal mail, how would you be proposing? I mean, the legal mail in terms of your sending it in and they're sending--your client sending something out, I think--I'm not sure how that would work.

MR. MARGULIES: The same way that established protocol already permits it, Judge, and that is in any case involving classified information, security information, the clients do not have an unfettered access to mail documents. They can seal it and then it is given to a court officer, who, as I understand it, as it was explained to me by court security people, double seals it in a opaque envelope and it is sent only by registered mail and--and marked return receipt requested.

There is no reason, it seems to me, why the same--whatever modifications need to be in place for mail coming from Guantanamo why the same principal cannot apply.

As to us sending mail, the court security has made it quite clear to us that we cannot send mail--that we generate from an unsecured computer. It's my understanding that they will, as Mr. Wilner points out, establish secure computers and secure locations. And just like in any other classified information case, civil or criminal, we will operate within the restrictions that an extant framework has.

The only concern that I have, it's one of

the reasons that we have allied ourselves with a firm that has a D.C. office now, so that we can get a D.C. lawyer cleared and then I can work with him in his--there are some discussions we can have, because he will also be clear. But another way to obviate that would be to have secured rooms in more than one location. All the firms that are involved now are either New York, D.C., or Chicago. There are secured rooms in these locations or can create them, but just as a logistical matter we would like to have access to one in Chicago.

THE COURT: As I said there's a lot things to be negotiated and discussed, which I think get into more detail than I'm prepared to certainly decide at this point.

Mr. Margulies--not Mr. Margulies, Mr. Wilner, did you want to say anything else and if not I'll go back to the government?

MR. WILNER: I wanted to say one quick thing. On the mail, just so it's clear, I think we need to work out the procedures, but I think we need to be able to communicate by mail directly with our clients and them with us. So, if they mail us something, I agree with Mr. Margulies, it's going to go through registered mail, to us, at the

depository. It won't go outside of that without approval, but we need to be able to communicate with them particularly because of their location. We can't hop down and see them every week, so we've got to be able to communicate with them.

Thinking that through, I don't think somebody at Guantanamo poses a risk to the nation. He's in the most secure facility in the world. He really can't do anything with information, but we're going to need to be communicating, so on the mail thing maybe I haven't thought that through clearly enough. We would get mail from them, the government wouldn't review it, it would come to us in a secure location, we could review it there, we wold not disclose anything in it. And us writing them, I think we need to be able to write them, and I wish we were negotiating this out--

THE COURT: Well, I may require you to have some further discussions obviously about this, because some of this is not something that at least--there may be another forum for doing this.

MR. MARGULIES: Certainly that's the case, Your Honor. If the message to the client is Dear Mr. Hibib, I just wanted to let you know we're going to be down there next--August 17th, that with

two secure envelopes I think should be able to be mailed from my office. But to the extent we are communicating information that the government otherwise believes the court has held determined as classified, we have no problem with that coming from a secured location.

THE COURT: Let me--if you want to comment back on anything at this point and then I'll let you get into your prepared remarks.

MR. BOYLE: I think the discussion we just had was somewhat illuminating in that I think it's obvious that without monitoring with respect to the three that the military has classified as exceedingly dangerous and likely to use their conversation with counsel to cause us injury, that we would be accepting a great many things on faith.

For instance, if we had only classification review of documents and notes, we would be relying on the attorney's note taking discipline, we would be relying on attorneys who have said here today that they can't imagine why anybody held at Guantanamo could be a threat to the United States, and that's precisely our concern.

They don't have the intelligence training, the background to identify what is--what kind of

information could potentially be disastrous if compromised, and that's why at least with respect to--

THE COURT: Is this in the context of their identifying some future threat or are you talking about in a different way?

THE WITNESS: We could talk about betraying a future threat, a future operation--

THE COURT: I'm just trying to clarify what you meant in terms--I see them as sort of two boxes; one is the concern about their recognizing future threats, I mean, if they're talking about--

MR. BOYLE: I think it's somewhat more plausible that these lawyers could recognize a future operation, if it was described in particularity than it would be for them to identify information that passed, could or otherwise, if passed on, if compromised--

THE COURT: Why can't you accept--I mean, still don't know how you're struggling with this idea. If they--unless you don't trust them, then presumably the security clearance is taking--should be the vehicle for figuring this out at whatever level it needs to be done.

If they've agreed and the court would--all

is would have to be put into some sort of protective order sort of thing, so there would be no dispute about what the language is, how it's supposed to be done, et cetera.

It seems to me that if they agree that they're not going to say anything about this to anybody without you hearing it first or see it first, then you get the classification review and you get--nothing should be dropped out of this. I mean, the only way it doesn't work is if you don't trust them, to be blunt.

MR. BOYLE: I don't think it's about trust, Your Honor, because as we've discussed, we're prepared to trust them with the protection of information that is identified to them as classified and particularly sensitive.

THE COURT: But how would they--if they agree they're not going to say anything, how are they going to drop something inadvertently? That's why I said there was no third parties, so you don't discuss it, period.

MR. BOYLE: We're realists, Your Honor, that if information that isn't--doesn't happen to be recorded in notes, that may seem entirely innocent to these lawyers, but virtue of their lack

of intelligency training, that information could be compromised inadvertently, and that's the risk that we are unprepared to take.

Now, I haven't emphasized the other side of the equation, which is the military's independent interest in the intelligence value of these detainees.

THE COURT: Oh, yes. We now get to this. But it does seem me--I mean, I haven't seen anything remotely connected to just general interest in intelligence in terms of trumping all of the attorney/client privilege in order to be able to gather intelligence.

MR. BOYLE: Well, I mean except the fact that we're--we've never been here before. We've got enemy alien combatants confined by the military outside the territorial sovereign through the United States precisely because they are intelligence assets and that information is before the court.

I don't want to minimize that aspect of the equation, but I haven't emphasized it because I think the procedures that we have proposed for monitoring are fully supportable by reason of a concern of the detainees using their attorneys,

using the privilege of consultation to compromise national security as I've described.

And, again, you know, I should mention I don't sense in Your Honor's discussion of this issue that having more information about the threat that these three individuals pose perhaps in the form of a classified submission would be helpful to the court, it doesn't--

THE COURT: I think not at this point. I mean, we're not--the tact that the petitioners have taken is not at least to this--at this juncture not disputing whether or not factually, since they haven't had an opportunity to talk to them, as to whether they should be subject to monitoring. We're dealing with the issue of whether they should be monitored. Depending on the court's decision, obviously this may be an issue that would come up at a later point.

I didn't think factually, frankly, it required to be brought up at this point. I didn't think I needed something beyond the record that I have.

The fact that the government has, in the information that you have provided, indicated why they are particularly dangerous and of national

security concern. The two issues--I could see your intelligence interests strictly, but the two other interests that you've talked about, the future--any future discussions or future events, or whatever, I think can be taken care of as I proposed.

The other issue in terms of what they would know about your concern that they would be somehow getting information that would be--would be a problem in terms of their learning classified information. As I said I don't understand still why it's not taken care of by the security clearance.

The only thing that I see that's left of your concerns, which I think gets to the issue of the security clearance, which is true of anybody who gets a security clearness and people are provided with information, is that there is an expectation that you will use it appropriately.

I don't know how many cases of people who have not in the big picture of considering how many people get actually, you know, information that is classified and gets security clearances, keeping in mind the nature of the case.

MR. BOYLE: I understand, but we're relying on a lot with respect to three individuals

the military's classified as very dangerous. If we're limited to classification review, once again we are limited to reviewing what the attorney writes down.

I think you've heard enough today to know that if that is solely what's going to be examined by DOD pursuant to some classification review procedure.

THE COURT: Well, it depends on what they're proposing. I mean, they could do it in various ways. They can't reveal it either orally or in writing without your seeing it or hearing it. Anything that they've heard as part of this attorney/client conversation, which is narrowly drawn in terms of just the attorney and the client concerning the discussion that they've had at which we've labeled as all being classified, because they can't release it.

So, if they want to in any way disclose it to anybody, they have to either provide it to you orally, in writing, whether it's in other materials, whether it's notes or whatever. I don't know. I think there are some practical aspects to this. But by doing a prohibition that you can't reveal it, period, without your having an

opportunity whether it's an oral discussion, oral and--written discussion, or whatever, to know what the information is they're planning on releasing.

You can set up--you'd have to discuss this--how this information is provided to you if they do want to reveal something so that you can do the appropriate classification review. I didn't get into that, but I think that we're talking about the conversations, we're talking about anything that they do in terms of, you know, notes, the things that are fairly narrow in terms of they would be writing that come from the detainee and go back to the detainee relating to their specific case.

MR. BOYLE: I think Your Honor's appropriately recognized there are multitude of logistical concerns we're going to have to go in fashioning a protective order in this case, regardless of what approach is adopted toward protecting--

THE COURT: That's true. I'm not suggesting it's going to be easy.

MR. BOYLE: Counsel has a lot of mispreceptions about the process, including whether it's possible to set up secured facilities in

private law firms and so forth. I mean, there's a lot of things we're going to need to go through with them before we burden Your Honor with a proposed submission.

THE COURT: Well, you'll have an interesting time having some discussions, however this works out. I mean, there's a lot of issues. I've only touched on certain things. You've raised a number of issues as have they that are still going to require some additional discussions.

MR. BOYLE: The core of our position, you know, separating intelligence value for a moment, because I think in this context we're dealing with enemy alien combatants confined by the military pursuant to an authorization of the use of military force against Al Qaeda and its collaborators that the--given the reason for their detention, that is not to be ignored, that there could be important intelligence insights derived from these communications that would not be derived from the interrogations that have occurred thus far.

I don't want to minimize that, because I think that's a legitimate interest to be accounted for here. That's why we have these individuals. There's no reason that the--

THE COURT: But let me just play devil's advocate here. I fully understand the value in terms of voluntarily leaking information that perhaps an interrogation are things you should not be able to glean, but abusing the attorney/client relationship in order to get this, and I have to say to you that I don't see anything, you know, in terms of you were careful enough not to brief that portion of it, I raised it because it seemed to me it lurked beneath the surface. But there's no briefing on what authority, other than somehow if I decide they don't have any rights and by the goodness they get an attorney.

MR. BOYLE: I guess where I'm skeptical is I don't know why it has to be assumed that because there is habeas jurisdiction, we have to import this wholesale attorney/client privilege model--

THE COURT: Well, it's not be imported wholesale. I mean, it's going to have certain limitations to it that I have discussed. Certainly this is not the way to do it, but I mean as practical matter one of the things I think the court has to consider, which is why I've raised it with you, that there are other ways, other than monitoring, that would achieve the purposes, I

think, of at least--and I'm going to consider what you're saying. I told you I didn't make a decision and I haven't.

I'm going to address what I viewed, so I could hear back from you, what you viewed as the weak points of setting this up that would address the concerns that you had, which would keep the narrow attorney/client privilege in tact in this context, but would take care of all of your other security concerns.

But it certainly is narrower in some respects in terms of the way I've set it. They are, I have a feeling, are going to come through with requests that are not going to work that they would ordinarily have in terms of a broader opportunity to have people working on matters, and I'm privy to this information, and I've made it a much narrower one. There's certainly going to be other restrictions, just because of the nature of the case and the nature of the information that's involved, and I don't have any question about that. Nor am I downplaying the intelligence value, but I think there is an issue here by using the attorneys to basically gain this information.

If they're going to have any meaningful

communication, now whether these people trust them or not that's an issue you're going to deal with--

MR. BOYLE: I don't understand.

THE COURT: --with every client.

MR. BOYLE: I don't understand why the court would think that problematic if the information is not going to be used to test the legality of their detention.

THE COURT: Because it completely undercuts the purpose of an attorney/client privilege and an attorney/client effective discussion if--certainly if they're asked, they may not believe them, but if they're asked by these clients as to whether these are monitored or not or whatever the system is, they're expected to be truthful if they are monitored, if they're not, they may still not believe them, but at least you would present it truthfully as to whatever the system is to see if there can be any developed of a relationship in order to present.

Hamdi certainly makes it clear that what you're looking at in this enemy combatant kind of situation with the habeas, sets out certainly somewhat of road map to take a look at it, and it's not the typical--not necessarily the typical case.

We're not getting into all of that.

But I still think there--there is a problem of just leaping to monitoring and abrogating this whole attorney/client privilege, which is, you know, is very important to the whole operation of our legal system without any other support forum.

MR. BOYLE: Well--

THE COURT: National security doesn't trump everything.

MR. BOYLE: A broader submission, but once again we start from the premise that there aren't any constitutional rights evident here.

THE COURT: I will let you argue this.

MR. BOYLE: There's no reason to assume that now--and indeed as I mentioned earlier--that this is not a criminal proceeding that would implicate the Sixth and Fifth Amendment rights to counsel.

I understand where Your Honor started, which is perhaps there's a functional justification for having a lawyer involved here, so that the court can fulfil its responsibilities to test the legality of the detention.

It seems to me that a functional argument

doesn't carry the day where as we submit it at the outset, the constitutional rights on which they rely to challenge the legality of their detention don't--don't protect them in Guantanamo as enemy aliens and held outside the territorial sovereignty of the United States.

In any event, would--thus the petition could be resolved as a matter of law without any attorney/client consultation and then beyond that as the court I think alluded to, Hamdi makes clear, even with respect to citizens, that the court's role here is exceedingly narrow, not addressed to whether these individuals have any violations of the law of war or whether this quasi criminal process that the military has set up has been fair in that regard, but rather they can lawfully be held as enemy combatants, and that process has to take place in a manner that's very, very sensitive to the fact that we are in hostilities.

The hostilities from which these individuals were taken are still ongoing, and I think it's--the cases make clear in a variety of context that the government's interest in protecting the country, protecting secrets can be a countervailing interest that can support procedures

that may have the effect of--of reducing in some way the quality of an attorney/client consultation.

So, to me the functional analysis that the plaintiff--that the petitioners offer doesn't--doesn't really justify what they're asking for, which is an unqualified right to engage in unmonitored conversations with these--with these detainees.

Again, I feel like I'm repeating myself, and that's probably because I am, but the problem we've got with respect to these three detainees, whom the military considers very dangerous, and by virtue of their training and background and motivations inclined to use this attorney/client consultation in some way to harm the government--and for now I'll focus solely on the risk of passing information through the attorneys to family members or others--the concern we've got is not that these lawyers will intentionally compromise this information. That's not what I'm focusing on.

I'm focussing on an inadvertent release or an inadvertent overhearing of information that is exceedingly sensitive. But because we didn't have the opportunity to monitor, because we didn't have

an opportunity to debrief, they have no way to judge. As I said earlier, they're going to get a security clearance. That means certain things, it doesn't mean other things. It doesn't mean that they're intelligence experts, it doesn't mean that they're counter terrorism specialists.

It seems to me that the military is due a great deal of deference in this area, in this context, in what I would say is an unprecedented challenge to the military's ability to hold individuals who were taken from an area of hostilities, and that deference I believe fully supports accepting the procedures that have been offered by the Department of Defense.

Now, I haven't focused so much on classification review, because Your Honor wanted to talk about the monitoring in greater detail, but it seems to me that the classification review cannot be accepted here, there's no other way to make this work. If, in fact, as petitioners demand they should be trusted to keep whatever information they glean from these detainees confidential, we have a couple of problems. We've greatly heightened the risk of an inadvertent disclosure because these individuals, these attorneys, won't have any idea

what is classified and sensitive and what is not and under the principal that when everything is top priority nothing is, I think the risk of an inadvertent disclosure becomes that much greater, and then the workability concerns, not only for the petitioners but also for the government become heightened.

From the government's standpoint, we have--we have the authority only to classify information pursuant to the executive order, that was compromised which would affect national security interest.

The point I made earlier about the criminal statutes, which Your Honor cited, those statutes, barring disclosure of classified information, are part of the regime that the government relies upon to protect the nations secrets.

If we did not have classification review, if information could not be called out to these attorneys as classified, I don't know how those statutes would work. Seems to me all they've got to worry about is a protective order. They won't know that any particular information they're dealing with is classified and, therefore, can say

well, I didn't know it was classified. So, by virtue of not having classification review, you're completely enjoining the operation of those statutes that--

THE COURT: My proposal is they're to consider everything classified unless told not--that it isn't.

MR. BOYLE: The problem is I'm not sure that makes out, in case information is disclosed, makes out a case for compromised classified information. How did they know?

THE COURT: Well, I think if they--if they have to deem it as classified information and it turns out that classified information actually gets out, then I think, you know, they have taken the risk, by agreeing, that's why I set this all out, by agreeing they're going to view it this way. If they think a question about--you know, they think something isn't, then the proposal is that they have to come to you, you look at and make a decision about whether it actually is classified or not. The way it operates, it may turn out that that turns out to be more of a discussion than you think. I don't know.

MR. BOYLE: Your Honor, I think they would

have violated your protective order in those circumstances, but I don't know how. If they disclose something without checking with us first to see whether it was classified, I don't know how we could say that they compromised classified information in violation of criminal statute--

THE COURT: I'm not here as the expert on the criminal thing, I'm just pointing out to you that there are several--apart from doing court orders, that certainly there are several statutes that take--that make it clear that classified information, and certainly you're going to provide--give them access to some anyway.

Presumably as part of this, there's a chance that that's going to happen, that all of this information that there are--it's treated seriously under the criminal statutes and framework and that, you know, one would expect that they would agreeing that this is the approach they're going to be taking.

I also think that frankly a lot of the information that would be coming out, wouldn't be that difficult to figure out where it came from, because it's going to be pretty specific to the individuals. You will also--

(Simultaneous talking.)

MR. BOYLE: I'm sorry, we started at the same time.

THE COURT: You're going to know most of the information in terms of any of their aspects in terms of their detention, their original detention or anything at Guantanamo, you'll know what they know.

MR. BOYLE: We know some of what they know.

THE COURT: Well, leaving aside any intelligence value they have about their other potential activities or alleged activities.

MR. BOYLE: Which I would submit is important, and I suppose if something was published in the New York Times, we might have an idea as to how the information was revealed, but if information instead is passed through family members to somebody who is in collaboration with Al Qaeda, I'm not sure we'll ever find that out.

In any event, it seems to me that as Your Honor I think recognized that some system of classification review of written materials is going to be required here, absolutely required here if nothing else.

THE COURT: I think unless there is something else that--some other argument you wish to make--your time is up if this is your prepared remarks.

MR. BOYLE: I appreciate the court's indulgence. One thing I wanted to mention was the situation that's raised by the petitioners with regard to our treatment of those detainees that are going through commission process.

THE COURT: I don't have that issue today, so I'm not going to get into it. But is there some particular thing you wanted to raise with that?

MR. BOYLE: Yeah. They raise it as a charge of inconsistent treatment, that how can we be proposing monitoring and classification with you here when we're not doing so with respect to people who are concededly very dangerous and who have been brought up on charges of violating laws of war, et cetera.

I want to call the court's attention, I'm probably violating a rule that I'm arguing something that's already in the briefs, but I wanted to call the court's attention the fact that as part of those commission defense teams, there is a military officer, a military defense counsel, who

is, in fact, trained with regard to matters of classification and intelligence matters who is present for all of those attorney/detainee conversations, and that is another mechanism that is used there in substitution.

So, with that, Your Honor, I thank the court.

THE COURT: Anything that either of you wish to add? This has gone on longer than I had expected.

MR. WILNER: Thank you, Your Honor. Although it might not be necessary now, I would like to briefly address some of his--the government's constitutional arguments.

Let me just say, and I'm trying to do it briefly, first of all government counsel continues to refer to these men as enemy alien combatants, very dangerous people. I think it's important to know--this is not the constitutional argument--that none of these people has been designated by the government by the--under the President's military order as a person who they have reason to believe is connected with terrorism. That's extraordinary.

Fifteen people have been designated actually. I believe one of Mr. Margulies' client

has been designated. None of the Kuwaitis have been designated after two and a half years of being there incommunicado, interrogated probably thousands of times, and that should be on the record.

Government counsel said that this is a new situation. Well, we were here two and a half years ago. While there are new faces at this counsel table, they're making the same arguments. The arguments in the paper--in their papers, and I've got to say it, because, frankly, I couldn't believe it--were very much the same as what happened two and a half years ago.

They say because these are aliens in Guantanamo outside the sovereign territory of the United States, they have no rights to vindicate, no rights to counsel. Indeed in--and government counsel repeated it here, this case can be decided on the pleadings because they have no rights, that means they don't even need counsel to find out how they were captured or anything. It can be dismissed on the pleadings.

That's almost precisely the argument that they made before. Before they argued these are aliens in Guantanamo outside the sovereign

territory of the United States, so there's no jurisdiction in the U.S. courts and they have no constitutional rights.

The Supreme Court really flatly rejected these arguments. I think it's important for the future of this case to understand the Supreme Court rejected the idea that Guantanamo is an area outside law, outside American law. The Supreme Court found that Guantanamo is within, quote, the territorial jurisdiction of the United States, just as Kennedy in his concurrence stated that Guantanamo is in every practical respect a United States territory, and just to suit our oral arguments that even the aguanas down there are protected by American law.

What the Supreme Court did is find that it's illegally irrelevant that these people are aliens at Guantanamo, it's illegally irrelevant that these people, no less than American citizens, have access to the federal courts. That's what the court held.

It also explicitly rejected the government's argument that they repeated here again today that they have no claim to make through habeas and that this case can be dismissed on the

pleadings.

The court said clearly, petitioners' allegations that they have been held without access to counsel and without being charged with any wrongdoing unquestionably described custody and violation of the Constitution or laws of treaties of the United States. They stated a claim.

I really think, and I say this honestly on the record, I think that the government's arguments are simply contemptuous of the Supreme Court's opinion and not only in this case, in Rasul, I think they're contemptuous of the Supreme Court's opinion in Hamdi as well.

I found striking, and I have here page 9 of their reply brief, where they quote and try to explain away the statement at Hamdi, where he Hamdi, unquestionably has the right to access to counsel in connection with the proceedings on remand. By the way something the argument argued very strongly against in Hamdi.

The government then says, it's an incredible statement, this is right under the quote: In noting that Hamdi, quote, unquestionably has the right to access to counsel, end of quote, the court was not drawing a legal conclusion

concerning Hamdi's rights. It's the most inconsistent sentence.

They then go on to say: It is merely observing that Hamdi had, in fact, now been granted counsel. If the court's purpose was to say that Hamdi has been granted counsel, the issue is now moot, there's no reason they would have put in the line that he unquestionably has the right to access to counsel in connection with the proceedings. This is important.

These plaintiffs, aliens at Guantanamo, no less than American citizens have the right to be before this court and have the right to counsel. Let me say another thing too: The government is misinterpreting the Supreme Court's decision in another way and I don't--I didn't bring that case up, but the Supreme Court tried to emphasize that the right to habeas doesn't depend on the Constitution. Indeed it doesn't even depend on the habeas statute, and this is a terribly important point. Habeas is something antecedent to statute and antecedent to the Constitution.

Under the common law people had the right if they were deprived of their liberty to go before a court, and at that point the government has the

burden of showing that they are being held in accordance with the law, that there is a lawful deprivation of their liberty. That is antecedent to the Constitution. The habeas statute, of course, was passed before the Bill of Rights, that was the point the court of the making. So, the whole--their whole premise is wrong.

I wanted to state that, because I think it's important for the future of the case. If I can take just two minutes on a subject that's very important to us, and that's the access of the Kuwaiti lawyer. Let me just say who he is and why I think he important.

THE COURT: You had that in the papers. I set out the two proposals; am I accurate in what's being presented as the proposals?

MR. MARGULIES: They are our proposal. Now, as I said, our goal is to be able to effectively represent these people without compromising national security. We really believe, and we do have translators, but he's not a translator. He is a Kuwaiti of very high respect who was the first lawyer here. We believe his presence there is critical to establish a trust. Now, let me just say--

THE COURT: Well, let me if I could cut through this. I set out at the beginning the two proposals as I understood them. You were proposing, if you're going to use him to introduce, I assume that means he's not staying for the rest of the conversations.

If you're willing to have this introductory discussion be monitored, they suggested--I gave the two proposals. I think they are not--I don't know that they are going to be accepting or not accepting of if you monitor what he says as an introductory thing and he's not staying for the rest of it. You can hear what he has to say, which means you can stop it if you have a problem.

MR. BOYLE: If I can address that, Your Honor.

THE COURT: Sure.

MR. BOYLE: One of the reasons--one of the many reasons for--we need security clearances for all the lawyers that are going down to Guantanamo is the very set up down there, the configuration is classified. So, Mr. Al Hauron's presence at the facility would require a security clearance, which we cannot and as a matter of policy will not

provide him.

So, the best we can do, which is what Your Honor described, which is to allow the playing of a videotape of Mr. Al Hauron giving an introduction or perhaps supplemented by a videotape of family members with him.

MR. WILNER: Let me address that. There is nothing reasonable about the government. They haven't been reasonable on one proposal we've made--

THE COURT: Let me say one thing: In terms of the issue of whether Mr.--and I'll just call him Kuwaiti attorney if you don't mind, instead of mispronouncing his name.

The--he doesn't have a security clearance. They obviously are making--there are some decisions that have been made presumably at the State Department and elsewhere as to the--and the government has different relationships with different countries about how they're doing this.

I'm not inclined, frankly, to second guess them about somebody who doesn't have a security clearance and what arrangements they have with different countries and to insist that somebody be allowed there. I do think there is an issue for

you in terms of the introduction.

My feeling is that if they're actually going there is an issue in terms of his, you know, being present, then I don't know that a videotape, just as would you do a videotape deposition if people are not available, wouldn't suffice for the same thing with family or whatever.

MR. WILNER: May I. Let me address it, and I recognize this puts Your Honor in a difficult position. I'm justed miffed that any proposal made by the government is rejected, and I think that the purpose doesn't seem to be to share the goal we have is to try to allow these to have effective representation without compromising national security.

Let me say why the videotape unfortunately doesn't work. This is what we've heard, and it's all a matter of public record. Apparently a number of the detainees--a normal interrogation technique was telling people at Guantanamo that they're families are under threat with guns and other things if they don't disclose information.

I think that videotapes presented to them by family members or letters will be distrusted when they're saying and trust these Americans and

give them information. I think the presence of Mr. Al Hauron would be absolutely essential there, and he will do nothing other than make an introduction and talk to them and do that. His conversations could be fully monitored and stopped at any time. They can sit in the room with him, but they're only distinction is he's not Australian.

Mr. Margulies may point out that they've now given clearance for a young Australian lawyer, not someone like Mr. Al Hauron who is one of the most respected lawyers in Kuwait.

THE COURT: Let me interrupt for a second. As I said to you, the government has different relationships with different countries and different agreements, and I, you know, I think you should have some further discussions about it. I'm expressing a reluctance in terms of second guessing that, since it's obviously going to affect other--we have other nationalities as well to decide and overrule the government and say well, I'm sorry, even though you don't think that the person--they have a security clearance, that they--that from the governments--the arrangements that you have with Australia which you don't have with Kuwait are irrelevant.

I'm very reluctant, frankly, to do that and I'm not sure I'm prepared to do that. I can hear a little bit more in there--this to me is more of a--I think is sort of to some degree, it's not a legal issue in terms of a substantive merit legal issue, the way I see the monitoring of some of the others, it is an issue of concern, and I'm not downgrading it, but I think it's something that perhaps should be discussed to see if there are other vehicles for doing it.

You started off with one, they--originally it sounded like there were going to be interpreters, at least in the conversations you had with me. This has moved along and they've come up with different proposals. It may be that there's another way of actually doing this, I don't know.

I have to say to you that I'm very reluctant to overrule the government and say well, I'm sorry, no security clearance, it doesn't matter whether you've got these agreements or we've go different relationships with different countries and it's all irrelevant.

MR. WILNER: Your Honor, I really do appreciate that. I do. I think--

THE COURT: I think it's not a legal issue

as to whether somebody without a security clearance gets to go. I think in terms of--I would have to order them to have somebody who's not a security clearance, and the government feels that they have different relationships that don't fall into the same category as the Australians and say yes, he's required to be there.

MR. WILNER: Your Honor--

THE COURT: There's no legal basis for this.

MR. WILNER: Can I try to address that and then--I recognize the difficulty. I think it is a legal issue, because the issue is the provision of effective representation for these people to have meaningful access to the courts.

Now, we started out we wanted Mr. Al Hauron to come in just like us, have unmonitored access to them, the government said no. I think they're wrong about that, but we have tried to move reasonably to say what is Mr. Al Hauron really essential for to give meaningful representation, effective representation. Let me just say, because then I think it becomes a question of reasonableness or encouragement to the government to look at this.

The government said what's different from Australia, we have an information sharing agreement with Australia and that's why the lawyer's in there. Frankly, that agreement doesn't apply. It applies to government officials and government contractors. So, the lawyers it doesn't apply at all.

When the government counsel stands up and say this is a secure base, we can't allow people in there to see this, none of their arguments hold up. They allow reporters from around the world to go to Guantanamo and see this, and they allow them in there.

What we're saying is this is important and critical for to us have--establish a trust in confidence, enough necessary to have effective representation. We don't want to do it any way where security could be jeopardized, monitor everything, stand there with us. But to say no in those circumstances I think is plainly unreasonable and is really an indication of where--the way the government has tried to move here. Rather than working it out reasonably, they've taken every position to try to block people. Thank you, Your Honor.

THE COURT: Anything additional that you have?

MR. MARGULIES: Yes. Your Honor, let me try to be brief. I am deeply concerned that while we are waiting for Your Honor to spell out in an order, the fruits of this hearing, that I will be deprived of access to my client, Mr. Hibib, who has been held--he was arrested, in fact, seized, in fact, of October of 2001.

THE COURT: Where are you in your security clearance?

MR. MARGULIES: Let me relay all that. I have satisfied all of the requirements, my interim security clearance has been approved, I have gone through the training provided by court security, I have even signed the government's proposed conditions, the ones that they would have us act under subject to the qualification that I reserve the right to challenge it, which is in their restrictions, which is--rather which is in their proposal.

I made a written request as their rules require. That request was sent August 5th. I have confirmed that they have received it. It asked to go down there August 12, that is last week. I

received no response to that.

I asked again--receiving no response, I contacted the government on August 12, both at Guantanamo, the person who is the point of contact for our arrangements down there who indicated that he had to receive approval from DOD and DOJ. He identified the person at DOJ that I had to speak with. It is a lawyer who is not present here now, but with whom I spoke both over the weekend and last week. His name is Andrew Wardon. Mr. Wardon confirmed that I have complied with everything that DOJ asks for, and that as far as DOJ is concerned there is no longer any obstacle for me going down there.

I asked to go down there again tomorrow after this hearing, and I have been advised that I cannot because DOD--and I don't know who at DOD--hasn't authorized the trip. So, therefore, the representative at Guantanamo, who is a Lieutenant Colonel Randal Keys, K-E-Y-S, literally cannot accept my flight plans.

I am concerned--and now we are told that one week from today there are commission proceedings that are getting under way, and it is the basis position that those commission

proceedings prohibit any other lawyer coming down there for at least two weeks.

So, that if I am not able to go this week, and at this point I do not have any plans--the way it is, Your Honor, is I have to fly to Fort Lauderdale first on a commercial flight and then on a military flight from Fort Lauderdale to the base. And I have not been able to make my plans to Fort Lauderdale since I don't know if I'll be able to get out of there. If I don't get there this week, it may be two weeks or more before DOD says I can go, even though we are in all respects compliant.

A couple other observations, Your Honor, that do not presently appear in the government's pleadings, and they go beyond what--the information that I learned more recently.

Mr. Hibib as Mr. Wilner points out has been designated as a candidate for military commissions. It is correct, however, that Mr. Hicks had unrestricted, completely unrestricted, access to his attorneys for six months after he too had been designated as a candidate for military commissions.

At that time during that period, the only matter pending before the court was Mr. Hicks'

habeas action. So, just as Mr. Hibib, there was one matter and one matter only before the court, and that was his habeas action and he was allowed unrestricted access.

Mr. Hibib like Mr. Hicks has been moved to a different part of the facility. He has been moved to Camp Echo, which is where all the people who have been designated are held. And Mr. Hicks--or rather Mr. Hibib does not appear in the government's pleadings, but I learned over the weekend has now for the first time been allowed contact with his family. He was allowed to make a phone call to his wife after he had previously been told that his family had been killed. He spoke with his wife for the first time I believe it was Friday. There is no basis, as far as I can tell, for the inconsistent treatment.

The one thing that they rely on in court today is the presence of military counsel, but they do not point out that the commission rules require that military counsel which--rather--two things, first as the court pointed out: Civilian counsel is trained just as we are in the control and use of classified information, but more importantly military counsel must--and this is by their rules

in the commission--quote, conduct their activity consistent--their activities consistent with the applicable prescriptions and proscriptions specified in the special administrative measures signed by civilian counsel. In other words, military counsel must do the exact same thing as civilian counsel. The presence of military counsel does not change Mr. Hibib's circumstances.

The last thing I would point out, Your Honor, is this: The court asks us to presume that the court perceive the Criminal Justice Act and the All Writs Act to provide a basis for this court to appoint counsel.

It is, of course, correct that there is no motion for appointment before the court. These detainees already have counsel, but the Criminal Justice Act provides for other power that the court will have.

And with regard to that, I'd like to talk a little bit about some deficiencies in the case that the government relies on. The government relies on Perez, Perez the 11th Circuit decision. They invoke it for the proposition that the Criminal Justice Act contains a provision about collateral review and, therefore, is distinct from

what was going on in that case, which the 11th Circuit described as direct review and, therefore, according to the 11th Circuit's view the CJA did not apply.

That view, of course, has never been accepted. One of the reasons is, and this is what the government omitted, that decision came down in 1986, Your Honor. That same year Congress changed the Criminal Justice Act Statute and the collateral review language is no longer part of the Criminal Justice Act.

In addition, this is precisely a collateral review. They have now created the Combatant Status Review Tribunals, and I venture that the government after those tribunals for those whom it continues to hold will say that this is a collateral challenge to the result of that Combatant Status Review Tribunal. Unless they want to eschew any reliance on those tribunals at this point, this is quintessentially what they will say, is that it is a collateral challenge.

With respect to the collateral challenge, Your Honor, I would observe this, of course, I go with what Mr. Wilner says about the Constitution. I look forward--apparently the government remains

steadfast in its position that these people may be held in a prison beyond the law and that they have no rights that may be enforced in this court. That, of course, is the position that they raised before successfully in this court, in the D.C. Circuit, unsuccessfully in the Supreme Court.

What the Supreme Court said is that the proposition that they have no rights that may be enforced in a federal court is precisely what they are mistaken about, that is why, of course. There is nothing cryptic about footnote 15. It was exactly responsive to the government's long-standing argument, and I look forward to the opportunity to litigate whether Rasul was, in fact, a fire drill that really did nothing but establish an advisory opinion.

But in particular what Rasul said was that this court has the authority to determine the lawfulness of the detention, and I believe that it is simply an affront to the decision to suggest that this court's authority, and that's the language the Supreme Court uses, is limited to watching and standing by as long as long as the government sees fit and that they may hold these people, despite the court's authority, under any

conditions they impose for ever so long as they would have it.

In the meantime, Your Honor, another thing that the government did not respond to is this: There are deeply disturbing allegations that Mr. Hibib originally seized by the Pakistanis was rendered to the Egyptians and tortured there at either the direction or complicity of the United States. That allegation comes from no less an authority than the Pakistanian foreign minister.

We have deep, deep concerns about Mr. Hibib's welfare, that is why it was prepared, even over objection, to accept the government's conditions and that is why as quickly as I could I got the approval to go down--or got the clearance and the ability to go down there, and I am very concerned that I will not be allowed to go while this continues to unfold before your court. I would ask that the government make whatever is necessary for whomever at DOD has to give the final approval for me to make my flight down there as soon as I can.

THE COURT: I ask you to respond to the last part. It does seem to me if he's accurate that once the commission proceeding starts there's

going to be a two-week period where nobody is going to be able to go. If he's got--if he's willing to abide by all of your conditions, what's holdup?

MR. BOYLE: I guess I don't have information with me sufficient to respond. I would need to consult with DOD. What I had heard--I think it's somewhat inconsistent with what counsel said--is there is a week when because of commission activity and the available space down there that the logistical concerns--that that logistical concerns would prevent additional counsel being present and so forth. I thought it was a one-week period. I don't know when that is.

THE COURT: What I would ask is if you would contact DOD and find out what the problem is, then I would ask that--we could probably do it on a conference call--

MR. BOYLE: One other issue we've got is I know he has agreed to--

THE COURT: He's agreed at this point to follow all of the procedures that have you set out with the idea that he can protest them at a later point, which means if I come up with something different then he hasn't locked himself into following your procedures. But he's willing at

this point to follow everything you've set out, if I understood him correctly.

Therefore, there isn't--he doesn't have to wait for my decision, assuming that if he's covered by DOJ, you know, I would be interested in knowing what the problem is, that he would not be able to go as quickly as possible.

MR. BOYLE: The other thing I wanted to mention is there's another step we need to get through, which is--with Your Honor, is bringing in a suitable protective order, which is going to govern, you know, the treatment of classified information in the case.

And I--I haven't thought through it completely, but there may be important issues that need to be addressed on that issue in advance of counsel, although I haven't thought it through completely, but--

THE COURT: Well, whatever it is, it would be helpful to find out and you can let me know this afternoon. What I would ask is--are you going to be around?

MR. MARGULIES: Your Honor, I will eventually be around, but this is precisely the concern again--

THE COURT: I know, but the court reporter if nothing else is--we need to take a break. I do want to here this afternoon what the concern is, if there is one, and we can deal with it at that point. My question is: Where are you going to be?

MR. MARGULIES: I will give the court my cell phone number.

THE COURT: If you would do that, then I would ask that you--how about 4:00, that gives you plenty of time to talk.

MR. MARGULIES: Your Honor, if that's all right, I would like to come back before the court rather than through a conference call.

THE COURT: All right. We can do that.

MR. BOYLE: We will--I am advised that there are a host of logistical issues associated with training that needs to take place down at Guantanamo, but--

THE COURT: I'll hear whatever your response is from it in terms of doing it. It does seem to me if he's covered everything that some, not having an open-ended that it would be appropriate. I can't see why some of this can't be done certainly by the end of the week.

MR. BOYLE: Your Honor, we'll get the

information and be prepared to share it with you.

THE COURT: All right. If there's nothing else, the parties are excused.

(Recessed at 12:38 p.m. to 4:07 p.m.)

THE COURT: Good afternoon again. So, let's go ahead.

THE CLERK: Recalling Civil Case 02-828 and 02-1130. This is a continuation of a motion's hearing.

THE COURT: What information do you have?

MR. BOYLE: Brian Boyle, Your Honor, for the government. I was able to confirm with some phone calls that circumstances alluded to by counsel, the commission process that's under way, culminating in a motions hearing involving at least Mr. Hicks and--so, they're hosting at Guantanamo family members and a number of other military participants, including some media next week.

I think that was what counsel picked up in his own discussions with the DOD personnel, and what I can tell the court, however, is that DOD is planning to host a first wave of habeas counsel during the week of August 30. My understanding at this ten seconds is that in addition to Mr. Margulies is there is one other lawyer in two other

cases, the Begg case and Abassi.

Judge Collier, who also has a request in place and who has received the security clearance that is necessary and should be in a position to go as well. So, what--I'm informed that there are flights, commercial chartered flights available, or at least scheduled on Monday August 30 with a return available, or at least on the schedule on Wednesday, which would put the lawyers down there for two nights, that there are base officers' quarters available for the use of the lawyers during that week, but that this is the earliest time under the circumstances that DOD can support this process having the--the privilege teams available and trained and taken into account all of the logistical details that are fortunately quite tedious when you're dealing with a--not only a U.S. military installation, but one that is secure and under rather extensive security protocols.

THE COURT: So, basically it's two weeks from today?

MR. BOYLE: Two weeks from today, Your Honor. There is a possibility, of course, that other lawyers will be in a position to meet with the detainees on whose behalf they have filed

habeas petitions by then. In other words, they could have clearances by then and a request in place, and there may be others that could be accommodated. But I am informed that with respect to the two requests that are outstanding, they can be accommodated during that week.

THE COURT: Is there any particular reason why they can't do it this week? I mean, next week you obviously have other people coming in, Mr. Hicks and whoever else is coming--

MR. BOYLE: These are questions--I'm sorry, Your Honor.

THE COURT: Go ahead.

MR. BOYLE: These are questions we asked, Your Honor, but in anticipation of the commission--military commission process that's taking place next week, the drills that they're going through to support that rather large presence, and the logistical details that remain to be worked out, including the assembly of privilege teams, identifying meeting places, making sure that there are sufficient escorts available, we could not confirm that it would be possible this week.

THE COURT: It's definite no or is it still possible, but it's a definite August 30?

MR. BOYLE: I'm exceedingly skeptical. The reason I'm hedging just a little bit is that in the time we had we weren't able to talk to absolutely everybody that we would ordinarily want to touch basis with. But based on the information I have, I'm very skeptical that DOD would be in a position to arrange for the presence this week.

MR. MARGULIES: Your Honor, I can certainly understand the court's reluctance to order DOD to make me--to make it available for me to go down there, but let me just address a couple things.

As I mentioned, Mr. Hibib has been moved--the reason I mention this is that Mr. Hibib has been moved to the part of the facility where Mr. Hicks already is. That is where all the people--in fact where Mr. Begg and Mr. Abassi have also been moved to where the people who may be candidates for military commissions are already being held.

It's in that area that they have had counsel access for over eight months. They already have space for lawyers and arrangements for lawyers to stay and so on. In other words, it's already set up for precisely what I would want to do.

As to the relevance of any privilege team, I believe what we established this morning, Your Honor, is that there is no privilege team to debrief me on--the privilege team would not debrief me on my oral communications with Mr. Hibib. They would only review notes.

I can tell the court, I can tell the government I do not intend, given what I have heard about Mr. Hibib, to question him. I simply want to impart information to him so that Mr. Hibib knows that he is not alone in the world, and I do not think there will be nothing for the privilege team to do, even if there were notes for them to review. And as I said, I'm ready to go down this week. I brought my passport.

THE COURT: Anything you want to respond to?

MR. BOYLE: I'm not sure I have much else to add, Your Honor, except if counsel is interested in making contact for the purpose of confirming to the detainee that he's not alone and has somebody purporting to represent him, we could arrange in the short term to have a correspondence delivered.

My understand is Mr. Hibib speaks English. We could get him a letter from counsel indicating

the forthcoming visit, something to that effect.

THE COURT: It's obviously not being there, but it's better than nothing.

MR. MARGULIES: I grant the government that it is better than nothing. What I literally had in mind, Your Honor, and I indicated this in an e-mail both to DOD and to Mr. Wardon at the Department of Justice is I wanted to go through with him over the course of two days six documents. The first is the petition that we filed on his behalf with this court that it would show who it was that was advocating for him and the position that we were taking. All of these are public record, and then this court's ruling on the dismissal, and then our brief in the D.C. Circuit, and the D.C. Circuit's ruling, and then our brief in the Supreme Court and the Supreme Court decision in Rasul so that Mr. Hibib would understand what has been done on his behalf, and I'm not even asking to bring the government's responsive pleadings, just so that he would know it was being done.

I was using a shorthand to say that what I want to do is let him know who I am. What I really want him to know is that there is a reason why this

has taken so long and that, though, it is one I regret, it is likely--given the way the process unfolds, it is likely that it will continue to take a while, but I want him to know that people are advocating on his behalf and this is what it looks like.

THE COURT: Mr. Margulies, I'm reluctant to jump you ahead of everybody else. If they didn't have a specific date I would feel differently about it. I think waiting two weeks after the length of time in terms of what you plan on doing, but I will require that it be done on the dates that they've talked about so there's no slippage, assuming you're available.

MR. MARGULIES: I will make myself available, Your Honor. I will also take the government up on their offer to communicate by mail.

THE COURT: I think you should do that. There may be some other matters that will be happening also in the meantime.

MR. MARGULIES: Understood. In fact, Your Honor, I would point out if the court issues its ruling that establishes different conditions that are more along the line of what we had asked for

than what the government had asked and that I agreed to under protest, we would probably seek to use those. Although frankly if it would delay the visit, then I'll continue to just abide by their conditions.

THE COURT: I would expect then that by August 30--that on August 30 he would be able to go, and you would provide him a way to communicate by mail as you've offered.

MR. BOYLE: Yes, Your Honor.

THE COURT: I just want to make sure there isn't any slippage.

MR. BOYLE: I understand. And I will commit to making a return visit, if there's any issue with that respect.

One opportunity--one window of opportunity this provides is to begin to work on a protective order that I think will be essential, as I think Your Honor recognized, in dealing with the issues in this case and the classified information that's involved.

I would hope that we could start the process with counsel for the petitioners very, very soon of trying to haggle through a protective order. One problem, of course, that we've got is

some of the issues that would naturally be addressed in a protective order require some clarification from Your Honor about the specialness or the measures and how they will be enforced or not, the classification review and so forth, but it seems to me that between now and August 30 we can take a stab of putting a protective order in place.

THE COURT: I would certainly hope that you would be starting to have discussions. I mean, you don't have to wait around for the court making a ruling. If you can come to an agreement, it's one less thing for me to do in this process.

Did you have something additional?

MR. WILNER: Yes, Your Honor, thank you. I'm sorry to trouble you with this, but in line with Your Honor's admonition that we try to work things out, following the hearing I did call government counsel and ask if they would reconsider the issue of the Kuwaiti lawyer Mr. Al Hauron. I had hoped that I would hear back from now. We have--and I hope they will reconsider.

I just want to make the point that we are not asking for a security clearance for him, because under the circumstances that we say he would visit, under a total monitored visit where he

was not going to part any classified information, he doesn't have it, and he wouldn't receive any, because it would be monitored, he would not require a security clearance. So, I just wanted to report, I hope we will be able to work that out. I've asked the government to respond. Thank you.

MR. BOYLE: Happy to respond, Your Honor. I apologize for not doing so earlier to counsel directly, but we were involved on the other--deeply in the other question on access.

I don't think there's going to be any reconsideration here. The problem we've got and I may have misstated this to Your Honor earlier is that a security clearance is required for anybody who expects to have contact with a detainee of any form, because of the fact the detainees possess classified information, very sensitive information, and we can't muzzle them, we can't control what they say.

I think I may have said something about the--based on my recollection that certain aspects of the configuration of Guantanamo installation were themselves classified, and that would pose a separate problem. I haven't been able to confirm that, so I don't want Your Honor to rely on that.

The problem is contact with the detainees. Unfortunately, I believe this is the final answer with respect to a security clearance for Mr. Al Hauron.

THE COURT: Well, I know it's an issue for you. I'll leave it at this point. Parties are excused.

(Whereupon, at 4:21 p.m., the proceedings adjourned.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOUD ABDAH, *et al.*, **Petitioners,** **v.** **GEORGE W. BUSH, *et al.*,** **Respondents**	**04-CV-1254 (HHK) (AK)**
ABDULSALAM ALI ABDULRAHMAN AL-HELA, *et al.*, **Petitioners,** **v.** **GEORGE W. BUSH, *et al.*,** **Respondents**	**05-CV-1048 (RMU) (AK)**
SAEED MOHAMMED SALEH HATIM, *et al.*, **Petitioners,** **v.** **GEORGE W. BUSH, *et al.*,** **Respondents**	**05-CV-1429 (RMU) (AK)**

EXHIBIT G

United States District Court
for the District of Columbia
Washington, D.C. 20001

Thomas F. Hogan
Chief Judge

August 19, 2005

Clive A. Stafford Smith, Esq.
Legal Director
Justice in Exile
P.O. Box 52742
London, EC4P 4WS

***In Re* Guantanamo Detainee Cases**

Dear Mr. Smith:

It has come to the Court's attention that there has been some confusion regarding counsel of record's responsibilities under provision IV.A.7 of the Amended Protective Order, entered by Judge Joyce Hens Green, November 8, 2004. Although the Order provides that a privilege team will open mail to search the contents for prohibited *physical contraband*, the Order places on counsel of record the responsibility for determining that materials being forwarded to the attorney's client(s) comply with the Order's provision that:

> Written and oral communications with a detainee, including all legal mail, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GITMO (including the names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

The Court also reminds counsel of its responsibilities with respect to electronic filing of documents using the Court's CM/ECF system, and refers counsel in particular to the filing procedures set out in Judge Green's December 13, 2004, supplemental order.

The Court appreciates your cooperation.

Sincerely,

Thomas F. Hogan
Chief Judge

cc: Terry M. Henry

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,	)	
Plaintiffs,	)	
v.	)	**No. CV 02-0828 (CKK)**
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants.	)	

Declaration of Kristine A. Huskey

I, Kristine A. Huskey, hereby declare under penalty of perjury that the following is true and correct:

1. My name is Kristine Anne Huskey. I am over 18 years of age and a citizen of the United States of America.

2. I am an attorney in the law firm of Shearman & Sterling LLP. I am a member of the Bars of the District of the Columbia, the State of Texas, and the Supreme Court of the United States. Since April 2002, I have represented the Kuwaiti citizens who are detained at Guantanamo Bay.

3. On November 8, 2004 Judge Joyce Hens Green issued an "Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba" (the "APO"), in *In re Guantanamo Detainee Cases*, which applies to several pending cases involving the detainees at Guantanamo

Bay Naval Base, including the above-captioned case, *Al-Odah et al. v. United States of America et al.* The APO governs communications between detainees and their attorneys by requiring, among other things, that attorneys submit to the "Privilege Team" all communications from the detainees to their attorneys that the attorneys would like to have reviewed for a classification determination. Since October 2005, the Privilege Team has violated the APO in a number of ways, all of which are detailed below.

4. On September 13–15, 2005, I traveled to the Guantanamo Bay detention facility to meet with and interview my clients, several of whom were on hunger strike and in very poor physical condition. Two of the detainees on hunger strike had been admitted to the detainee hospital in order to be force-fed due to their advanced state of malnutrition and high level of weight loss. During the course of the interviews, the detainees handed over to me, in the hopes that we might move on their behalf for effective medical relief, printed medical charts illustrating their individual deteriorating conditions, which had been given to them for their own information and use by the medical personnel at the hospital. The charts showed, in graphical form, the detainees' ongoing severe weight loss.

5. In accordance with Section VII of the Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba (Exhibit A to the APO), I submitted these medical charts to the Privilege Team along with my other notes from that series of interviews. The Privilege Team refused to review or classify the medical charts, with the excuse that they had been "taken without permission" and "not

obtained through authorized means," even though the Privilege Team could not have possibly known how the charts were procured and that they had been provided to me by the two detainees in order to assist with their legal case. *See* 13 October 2005 Memorandum from Privilege Team, attached as Exhibit 1 to this Declaration.

6. When I later resubmitted the medical charts they were not only reviewed, but were determined to be "unclassified," demonstrating the Privilege Team's obvious lack of grounds to refuse to review such materials.

7. In addition to the medical records, the Privilege Team also refused to review or classify portions of attorney interview notes from our September 2005 meetings with the detainees. After the interviews, the notes were properly turned over to our military escort at the end of the trip and then mailed to the secure facility in Crystal City, Virginia. When I was notified that these notes had arrived at the secure facility, I submitted them immediately to the Privilege Team for classification review pursuant to the APO. However, these notes were returned to me with large sections of the text unreviewed and unmarked. The sections of my notes that the Privilege Team had refused to review explained one of the detainees' reasons for participating in the ongoing hunger strike, and detailed abuse that the detainees had suffered at the hands of various interrogators and the Respondent. I was given no explanation of why the Privilege Team had refused to review and make a classification determination of this information. In any event, the substance of this information had been previously determined to be 'unclassified' in a different set of notes.

8. During a trip to the Guantanamo detention facility in October 2005, one of my clients, Abdullah Kamel Abdullah Kamel Al Kandari, who was severely ill and on hunger strike, entrusted to me in my capacity as his attorney his "Last Will and Testament" that he had written just prior to our visit. During the interview, he read his will and testament aloud to my colleague, Thomas B. Wilner, and myself, and we both subsequently signed the document as witnesses. I placed the notation "Last Will and Testament" across the top of the document. The will includes sentiments describing how disappointed Mr. Kamel Al Kandari is by the American justice system as well as standard elements of a will and testament, such as messages to family concerning his wishes in the event of his death. When Mr. Kamel Al Kandari's "Last Will and Testament" arrived at the secure facility in Virginia, I submitted it to the Privilege Team for review after affixing a post-it note that read "Legal Document" to the will.

9. The Privilege Team refused to review or classify the document, stating "As it currently is written, we are not able to make a classification determination as requested by counsel since the document appears to contain messages to parties other than counsel," and that if "counsel wishes the information released to his family prior to the need to file the will," it should be sent via the normal detainee mail channels. Nov. 3, 2005 Memorandum from the Privilege Team, attached as Exhibit 2 to this Declaration.

10. Neither I nor any other counsel had relayed any information regarding the will or our intentions to the Privilege Team other than to submit the will for a classification determination pursuant to the APO. In any event, a "last will and

testament" is a quintessential legal document, which normally contains statements and dispositions by the testator expressing his last wishes and sentiments. Moreover, I submitted the Last Will and Testament to the Privilege Team for classification review—as we have done with every legal document, including our attorney notes, conveying information written by or received orally from the detainees—as part of my representation of Mr. Al Kandari.

I declare that under penalty of perjury that the foregoing is true and correct.

Kristine A. Huskey

Kristine A. Huskey

Dated: January 10, 2006

EXHIBIT 1

PRIVILEGED MATERIAL

MEMORANDUM FOR: Court Security Officer 13 October 2005

Fm: Privilege Team

re: Attorney Notes – Unprocessed Material, Attorney Shafer

ref : Amended Protective Order and Procedures for Counsel Access

We have reviewed Counsels submission. Three pages of material appear to be medical records which apparently were taken without permission from the US Naval Hospital at Guantanamo Bay. Since these were not obtained through authorized means (such as a FOIA request or other authorized means) we are not able to make a classification determination. These pages should be removed from the package and retained within the secure facility.

We have reviewed all other material and it is marked appropriately.

Privilege Team

EXHIBIT 2

PRIVILEGED MATERIAL

MEMORANDUM FOR: Court Security Officer Neil 3 November 2005

Fm: Privilege Team

re: Last Will &Testament – Third Party Communication, Shearman and Sterling

ref: Amended Protective Order and Procedures for Counsel Access

We have reviewed the Last Will and Testament submitted by counsel. As it currently is written, we are not able make a classification determination as requested by counsel since the document appears to contain messages to parties other than counsel.

Paragraph VI.C of Exhibit A of the Amended Protective Order specifically states "Correspondence or messages from a detainee to individuals other than his counsel (including family/friends or other attorneys) shall not be handled through this process. If the detainee provides these communications to his counsel during a visit, counsel shall give those communications to military personnel at Guantanamo so they can be processed under the standard operating procedures for detainee non-legal mail."

Given the situation, if counsel wishes the information released to his family prior to the need to file the will, it would have to be sent through normal mail channels as specified in paragraph VI.C of the referenced protective order.

Privilege Team

cc: Privilege Counsel

PRIVILEGED MATERIAL

TOTAL P.02